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JAMES H. MCKENNEY,
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No. 965

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

AUSTIN WALRATH, PETITIONER,

vs.

CHAMPION MINING COMPANY, RESPONDENT.

PRELIMINARY BRIEF OF PETITIONER ON APPLICATION FOR A WRIT OF CERTIORARI.

SMITH & MURASKY,
Counsel and Solicitors for Petitioner.

P. REDDY,
Of Counsel.

JAMES H. BARRY, PRINTER, 415 MONTGOMERY ST., S. F.

IN THE SUPREME COURT

OF THE

UNITED STATES.

AUSTIN WALRATH,

PETITIONER,

vs.

CHAMPION MINING COMPANY,

RESPONDENT.

Preliminary Brief of Petitioner on Application for a Writ of Certiorari.

This is an application under the provisions of Section 6 of the Act of Congress of March 3rd, 1891, establishing the Circuit Courts of Appeals praying that a writ of *certiorari* issue to the Circuit Court of Appeals for the Ninth Circuit, and requiring it to certify for review the record in the case of *Austin Walrath, Appellant* vs. *Champion Mining Company, Appellee.*

The action was originally commenced in the Superior Court of Nevada County, State of California, by Austin Walrath, a citizen of the United States and a resident of California, against the Champion Mining Company, a resident of the State of California, and formed and organized under its laws, to obtain $300,000 damages for the wrongful extraction by respondent of valuable minerals from petitioner's mining claim, and to obtain an injunction against further acts of waste and trespass.

The case was transferred from the Superior Court of Nevada County to the Circuit Court of the Ninth Circuit, upon the application of the respondent here, and upon the ground that the action was one arising under the laws of the United States, and that the title to the Providence Claim was wholly derived from the United States through a patent issued to petitioner's prede-

cessors in interest under an Act of Congress approved July, 26th, 1866, entitled: "An Act granting the right of way to ditch and canal owners over the public lands" (See Transcript of Record, pages 8 to 43).

The pleadings, under the ruling of the Circuit Court were recast and the equity side of the case tried.

On the trial, the petitioner, one of the owners of the Providence claim, contended that the line running S. 43 deg. W., and designated on all the diagrams by the letters f–g– (see Petition, diagram A) was the end line.

1st. *Because it was the only boundary common to both claims which was crossed by the ledge.*

2nd. Because the Champion Mining Company by the instrument under which it claimed title to the ledge, acknowledged and declared it to be the end line *both for surface and for lode* between the two properties. (Transcript of Record, pages 30–31–32–33).

The trial resulted in a decree which established the line f–g as an end line for its length, and fixed the line g–h and its indefinite prolongation eastwardly, as, another end line for the same end of the lode, thus:

Diagram A and Transcript of Record, pages 77, 78, 79, 80 and 81.

From this decree petitioner was allowed an appeal and assigned as error:

1st. The refusal of the Court to establish the line f–g– and its prolongation as the only end line for that end of the lode.

2nd. The fixing of the line g–h and its prolongation eastwardly as an end line for the Contact Vein.

3rd. The giving to respondent all portions of the ledge north of the line g–h– and its prolongation eastwardly, and therefore the right to take those portions of the ledge lying vertically beneath that portion of petitioner's surface designated by the letters h–i–k–h'. (See Diagram A and Assignments of Error; Transcript of Record, pages 266, 267, 268, 269, and 270.)

The Appellate Court established the line g–h as the sole end line and reversed the judgment of the lower Court in so far as it fixed the line f–g as an end line.

The facts of the case, as admitted by all parties, are fully stated in the petition for the writ, to which reference is hereby made. (See Petition for writ.)

Petitioner urges that a writ of *certiorari* ought to be granted:

1st. Because this is a case of peculiar gravity and general importance.

2nd. Because the issuance of the writ is proper in the interest of uniformity of decision.

3rd. Because under Section 6 of the Act of March 3d, 1891, establishing Circuit Courts of Appeals, petitioner is entitled to a writ of *certiorari* as a matter of right.

I.

The writ should issue, because the case is one of peculiar gravity and general importance.

1. The Circuit Court in its decree laid down the principle that the end lines of the original ledge located must be the end lines of all ledges acquired under the Act of May 10th, 1872, by virtue of surface ownership. The Circuit Court of Appeals has affirmed this doctrine. If that decision is to be final, then the title to a vast number of ledges, which came not to the miner by location but by virtue of his surface ownership under the special enactment of Congress, will be clouded and affected.

By the decision in this case, a rule, for the first time, is to be established for ledges acquired, not by location, but under the Act of 1872 by virtue of surface ownership. Thousands of mining titles are to be determined by it. Miners, who for the determination of their rights, have looked to the rule that end lines must cross the ledge, and that end lines were not to be determined by the names given them in the location will find the stability of the rules on which they have heretofore relied seriously impaired.

Locators who have rested secure since May 10th, 1872, as to the nature and extent of their rights in ledges acquired by virtue of surface proprietorship will awake to realize that the foundation of their confidence has been swept from under them, and that the wealth uncovered by their patience and their toil must pass to others, who periled none of the things and took none of the chances which made its development a possibility. Is not this case, therefore, of such peculiar gravity and general

importance as to induce this Honorable Court to issue the writ prayed for?

2. Moreover, the petitioner and his predecessors in interest have expended nearly $3,000,000 in the development of the Providence claim. (See Bill of Complaint, Trans. of Record, page 50, and answer page 57.)

They acquired their rights to the "Contact Ledge" May 10th, 1872; respondent made its first location on that ledge on January 2nd, 1877. (See Trans., pages 23, 24, 25.)

There was no conflict between the parties as to end lines until the year 1884, when it was discovered that the original Champion location overlapped the surface line f-g of the Providence, both for surface and lode. The Providence people objected, and the Champion Mining Company made the notice of re-location under which it now claims title to the "Contact" ledge. In that re-location it recited the conflict of rights, declared that its right to the ledge ended in the line f-g, running S. 43 W., and abandoned all portions of the ledge and surface south of that line (See application for removal, page 8 of Transcript, and notice of re-location therein, pp. 30, 31, 32, 33).

The works of the Champion were made to conform to that line so as never to cross it (Trans., pages 154–155), and both parties recognized it until a few months before suit was brought, when the respondent ran its 1,000 level over the line and then its 900 and 800 levels.

Therefore, in view of the amount involved, in view of the vast outlay of money by petitioner and his predecessors in interest in developing the Providence Mining claim, in view of the fact that petitioner has been, by the decision of the Circuit Court of Appeals, deprived of rights vested, or thought to have been vested, for nearly a quarter of a century—in view of the fact that respondent has recognized those rights by its own muniment of title, does not this case become a case of "peculiar gravity and general importance"; and does it not involve weighty and serious matters within the meaning of the decision of this Honorable Court in Lau Ow Bew's case, 141 U. S., 383, and in the case of *In re* Woods, 143 U. S., 206.?

II.

The writ should issue in the interest of jurisprudence and the uniformity of decision.

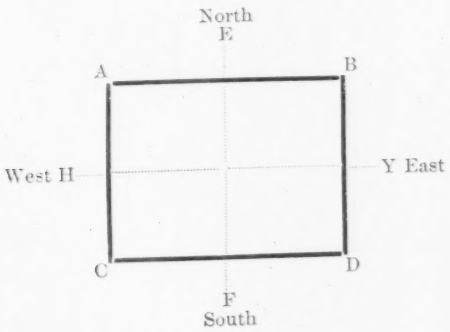
1. It has always been considered as indubitably settled by the decisions of this Court that the end line of a ledge must

cross the croppings or apex of the ledge, and that end lines are not dependent upon what they are called in the miner's location, but are fixed and determined by the relation which the actual course of the vein bears to the surface lines.

Flagstaff Mining Company vs. *Tarbet*, 98 U. S., 463.
Argentine vs. *Terrible M. Co.*, 122 U. S., 484.
King vs. *Amy*, 152 U. S., 222, 228.

The Flagstaff case, 98 U. S., 463, explicitly declares that side lines of a claim laid across the apex of the lode "are really the "end lines of their claim, considering the direction or course "of the lode at the surface." In the case of *King* vs. *Amy*, this Honorable Court declared that side lines laid across the course of the lode become end lines, and "that what are called side "lines, are in fact end lines."

Yet, if the principle laid down by the Circuit Court of Appeals in this case is to be taken as settled law, an end line need not cross, intersect, touch, or even approach the ledge. Under the decision of the Circuit Court of Appeals, the owner of a cross lode acquired under the Act of 1872 would be entitled to pursue it indefinitely on its course or strike. This is in direct opposition to the decisions of this Honorable Court, and its revolutionary nature may be readily seen by reference to the following ideal location made prior to 1872:



The letters A–B–C–D represent the surface ground, and the line E–F shows a ledge running north and south, and located prior to 1872; the line H–Y represents a ledge running east and west acquired under the Act of 1872 by virtue of the surface ownership.

The lines A–B and C–D– of the surface location are clearly and manifestly the end lines of the original lode E–F–: but can they be said to be the end lines of the ledge H–Y? The decision of the Circuit Court of Appeals would make them so, and yet we respectfully urge that every decision of your Honorable Court, inclusive of the one in the case of *King* vs. *Amy*, has been to the effect that the lines A–C– and B–D– are the true end lines for the ledge H–Y–. It will be readily perceived that if the lines A–B– and C–D– are fixed as end lines for the ledge H–Y– the miner would be given the right to pursue the ledge indefinitely on its strike or course—thus defeating the very object of an end line. This is exactly what the case of *Mining Co.* vs. *Tarbet*, 98 U. S., 463, says cannot be done, *when it decides that the miner cannot follow the strike of his vein beyond the side lines which it crosses, and that such side lines become end lines.*

2. By the decision of the Circuit Court of Appeals making the line g–h– an end line, all portions of the ledge north of a plane drawn through that line and its indefinite prolongation easterly and westerly were given to the Champion; and, therefore, those portions of the "Contact" ledge lying vertically beneath the parallelogram of the Providence surface, designated by the letters h–I–k–h′.

This is directly in the face and teeth of the decision of this Honorable Court in the case of *King* vs. *Amy*, 152 U. S., 222 and 227 to 228 which declares "The surface lines extended downward vertically therefore determines the extent of the claim "except when on its descent the vein passes outside of them, "and the outside portions are to lie between vertical planes "drawn downward through the end lines."

The Providence was prior in time and first in right on the "Contact" ledge. It acquired its right in 1872. The Champion acquired no rights at all until 1877. The decision of the Circuit Court of Appeals in this regard is, therefore, also at war with the principle laid down by this Court in the case of *Argentine* vs. *Terrible M. Co.*, 122 U. S., 484–485; and also with the decision of the Circuit Court of Appeals for this Circuit in the case of *Tyler* vs. *Sweeny*, 54 Fed., 294–295.

In the case of *Argentine* vs. *Terrible M. Co. supra*, this Honorable Court declared that assuming that on the same vein there were surface outcroppings within the boundaries of both claims the one first located necessarily carried the right to work the vein and the junior locator could not extend his workings under a location of earlier date.

It may be suggested in this regard that Section 2322 of the Revised Statutes seems to be plain upon the point that petitioner

is entitled to all portions of ledges which apex within his surface and lie within his surface lines extended downward vertically. If petitioner is prior in right it seems clear that no such portions of ledges within his surface lines extended downward vertically ought to be given to a junior locator.

III.

The petitioner is entitled to the writ of certiorari as a matter of right under Section 6 of the Act of March 3d, 1891, establishing Circuit Courts of Appeals.

The jurisdiction of the Circuit Court in the case of *Austin Walrath* vs. *Champion Mining Co.* in no way depended upon the citizenship of the parties. The case was not one arising under the patent laws, or under the revenue laws, or under the criminal laws, nor was it a case in admiralty. The matter in controversy exceeded $1,000, besides costs. *The judgment and decision of the Circuit Court of Appeals was, therefore, not final, and petitioner is entitled, as a matter of right, to have the case reviewed by this Honorable Court.*

Sec. 6, Act March 3rd, 1891, establishing Circuit Courts of Appeals, etc.

We submit, therefore, that the writ prayed for should issue.

1st. Because the rule established by the Circuit Court of Appeals will disturb and affect the title to nearly every ledge acquired by the miners under the Act of 1872 by virtue of surface ownership.

2nd. Because the decision of the Circuit Court of Appeals has deprived the petitioner of a right, not only recognized by all the parties concerned since 1877, but solemnly re-affirmed and ratified in 1884 by the respondent in the instrument through which it derives title to the "Contact ledge."

3rd. Because the decision of the Circuit Court of Appeals seems to unsettle the rule that end lines are not to be determined by what they are called in the miner's location, but by the relation of the course or strike of the ledge to some boundary of the surface.

4th. Because the decision of the Circuit Court of Appeals appears to enunciate the doctrine that the end line of a ledge need not cross the apex of the lode, or even approach it.

5th. Because the decision of the Circuit Court of Appeals would enable the miner to pursue a cross lode within his surface indefinitely, on its strike, thus defeating the very purpose of an end line.

6th. Because the decision of the Circuit Court of Appeals expressly permits the respondent, as junior locator, to take out certain portions of the "Contact ledge" lying within the surface lines of petitioner extended downward vertically.

7th. Because the decision of the Circuit Court of Appeals is apparently in direct conflict with the law declared by this Honorable Court in the Flagstaff case, in the case of *Argentine* vs. *Terrible Mining Co.*, and in the case of *King* vs. *Amy*.

8th. Because the judgment of the Circuit Court of Appeals was not final under Section 6 of the Act of March 3, 1891, and therefore petitioner is entitled to have the case reviewed by this Honorable Court *as a matter of right* under the terms of the Act.

Most respectfully submitted,

SMITH & MURASKY,
Solicitors for Petitioner.

P. REDDY,
Of Counsel.

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CASE No. 965

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AUSTIN WALRATH,
Petitioner,

vs.

CHAMPION MINING COMPANY,
Respondent.

ARGUMENT OF RESPONDENT IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI.

CURTIS H. LINDLEY,
Solicitor for Respondent.

Filed March ..... *1896.*

JAS. H. MCKENNEY, *Clerk.*

By .....
Deputy Clerk.

H. S. CROCKER COMPANY, PRINTERS, S. F.

6th. Because the decision of the Circuit Court of Appeals expressly permits the respondent, as junior locator, to take out certain portions of the "Contact ledge" lying within the surface lines of petitioner extended downward vertically.

7th. Because the decision of the Circuit Court of Appeals is apparently in direct conflict with the law declared by this Honorable Court in the Flagstaff case, in the case of *Argentine* vs. *Terrible Mining Co.*, and in the case of *King* vs. *Amy*.

8th. Because the judgment of the Circuit Court of Appeals was not final under Section 6 of the Act of March 3, 1891, and therefore petitioner is entitled to have the case reviewed by this Honorable Court *as a matter of right* under the terms of the Act.

Most respectfully submitted,

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By leave of Court and by stipulation of counsel for petitioner, the respondent, Champion Mining Company, herewith respectfully submits its argument in opposition to the issuance of the writ of *certiorari* applied for by the petitioner herein.

HISTORY OF THE CASE.

The action was originally commenced by filing a complaint in the Superior Court of Nevada county, California, by the petitioner herein,

whereby he sought to recover from the respondent the sum of $300,000 as damages caused by a trespass alleged to have been committed by the respondent upon the mining property familiarly called the "Providence Mine," belonging to petitioner and his co-owners. Coupled with the demand for damages was a prayer for equitable relief of injunction against future threatened trespasses. The case was removed to the United States Circuit Court, Ninth Circuit, Northern District of California, upon the application of respondent, on the ground that Federal questions were necessarily involved in the determination of the case upon its merits. When the record was filed in the Federal Court, petitioner filed repleaders, proceeding by amended bill on the equity side of the court for the purpose of obtaining injunction, *pendente lite*, and perpetual (trans., p. 46), and on the law side by amended complaint to recover the alleged damages.

The equity case alone was tried. The answer of the respondent filed to the amended bill (trans., p. 57) admitted generally the ownership of the petitioner and his co-tenants of the Providence Mine, but in effect denied entry upon any portion of that mine. Were it not for the nature of the equitable relief sought, the pleadings of the parties and the record before this Court might be said to characterize the case

as an action of trespass to try title to an underground segment of a ledge of rock in place carrying gold and silver, which ledge has its apex within the lands of both parties passing on its strike or onward course out of the surface boundaries of the one into those of the other. In other words the controversy is between two co-terminous mining proprietors upon the same vein or ledge, and the question to be determined by the trial court was, *By what vertical bounding planes are the respective rights of the parties to be limited and defined?*

The trial court declined to adopt the views of either party, but entered a decree establishing a bounding plane independently of their several contentions. From this decree petitioner prosecuted an appeal to the Circuit Court of Appeals, Ninth Circuit. The appellate court, in its decision on the appeal, directed a modification of the decree of the court below, and, as thus modified, affirmed it.

This modification was of minor importance, and considering the direction of the dip of the vein in controversy, as hereinafter explained, does not materially affect either party to the litigation. If this modification was of any advantage to either party, it was in favor of the petitioner, and I do not understand that any point is made by petitioner as to this modification.

The object of his petition is to induce this Court to review that part of the decree of the trial court which was affirmed by the Circuit Court of Appeals, establishing the bounding planes between the parties to the action.

We earnestly contend that the record now before this Court on this application affirmatively shows that this is not a case calling for the intervention of this Court.

The questions involved are neither grave nor of such general importance as will sanction the issuance of a writ of *certiorari*. The rule announced by the trial court, and affirmed by the appellate court—"that the same end line planes "bound all extra lateral rights as to all veins or "lodes within the surface boundaries of the claim" (see opinion of Judge Hawley, trans., p. 91)—is in harmony with the doctrine of all the antecedent adjudications in this court, as well as the courts of inferior jurisdiction. There are no conflicting decisions to be harmonized, and no uniformity to be established.

While the facts are somewhat unique and novel—thus requiring a new application of a well established doctrine or rather the application of principles analagous to those enunciated in the adjudicated cases—there is no diversity of opinion or conflict of decision.

We therefore urge that under the authority of **Ex parte John Woods, 148 U. S., p. 202; American Construction Co. *vs.* Jacksonville, Tampa & Key West Railway Company, 148 U. S., p. 372,** petitioner's application for the writ should be denied.

Thus defining the position of respondent on this application, we ask the Court's consideration of the record presented, that the correctness of our contention may be made manifest.

The relative situation of the properties of the litigating parties, their respective contentions and the views of trial and appellate courts will be fully represented by the aid of diagrams lettered uniformly to correspond generally with the exhibits used at the trial, and with the small plat forming a part of the opinion of the trial court reproduced opposite page —, of the record.

STATEMENT OF FACTS.

The essential facts of this case are so clearly stated in the opinion of the learned judge who tried the cause (trans., pp. 82–93) that further elaboration seems quite unnecessary. Yet, for the purpose of logically presenting the respondent's views upon the law to be considered, a brief statement of these facts as shown by the record, and concerning which there is no controversy, is convenient if not important.

TITLE OF PETITIONER.

The title of petitioner to the "Providence Mine" rests primarily upon a mineral patent issued by the Government of the United States under the Act of July 26, 1866, and the additional rights conferred upon the holders of that class of patents by the Act of May 10, 1872. The patent is printed in full in the transcript (pp. 250–255).

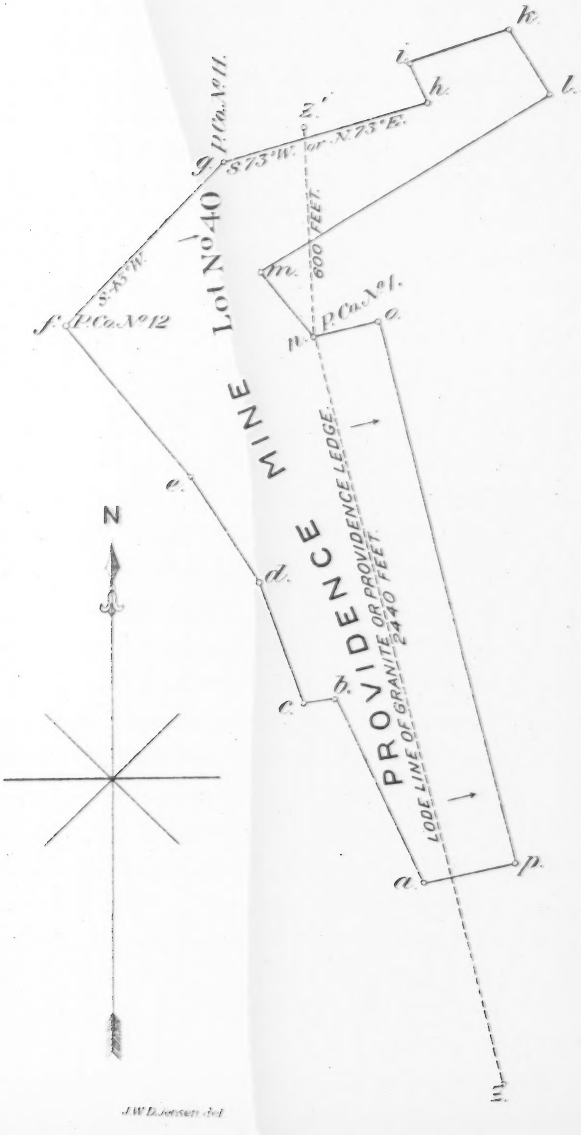
It purports to grant the Providence Ledge, vein, or lode in its entire width, for the distance of 3,100 linear feet, along the course thereof, together with the surface ground described by metes and bounds.

Accompanying the patent, and forming a part of it, is a map or plat, the essential features of which we herewith reproduce, designated as Fig. 1, inserted opposite this page.

This figure represents the Providence "location" as patented, and the lines a b c d e f g h i k l m n o p are the *lines* of such location described in the patent.

The lode or ledge z–z′ traversing the location in a northerly and southerly direction is the lode or ledge described in the patent as the "Providence Ledge," and it is the only ledge granted by the Government at that time to petitioner's grantors. We call it the "Granite Ledge" by reason of the formation in which the fissure

FIG. 1.


k.
i.
h.
l.
g.
1 pt. Co. No 11.
S 73° W. or N 73° E.
2.
600 FEET.
LOT No 40
MINE
PROVIDENCE
OR PROVIDENCE LEDGE
LODE LINE OF GRANITE
2440 FEET
m.
n.
1 pt. Co. No 1.
o.
f.
1 pt. Co. No 12
S 45° W.
e.
d.
c.
b.
N
a.
p.
J. W. Dawson del.

occurs. Its dip is easterly as indicated by the arrows. It will be observed that the lode line projects beyond the surface boundaries northerly (about 30 feet) and southerly (about 670 feet).

No controversy arises between the litigating parties with reference to either these surface boundaries, as such, or the Granite or Providence Ledge.

The lines a–p and g–h, which are crossed by this ledge, are factors, however, of controlling importance, to be considered later on. Otherwise we are not interested in the ledge or its pursuit beyond the surface boundary lines. The main shaft of the Providence is sunk on this granite ledge, and for many years mining operations by the Providence Company were confined to this ledge.

Long after the passage of the Act of May 10, 1872, another ledge was found to exist within the surface boundaries of the Providence, lying west of the Granite Ledge, and for that reason called by the Providence Company the "Back Ledge." It is called also the "Ural" Ledge, from the fact that it traverses property lying some distance to the northwest, formerly known as the "Ural Mine." We call it the "Contact Ledge" for the reason that it lies between two formations—granite on the east or hanging wall, and slate on the west or foot wall. The relative

position of this ledge, with reference to the Granite Ledge, is shown on the diagram designated as Figure 2, inserted opposite this page.

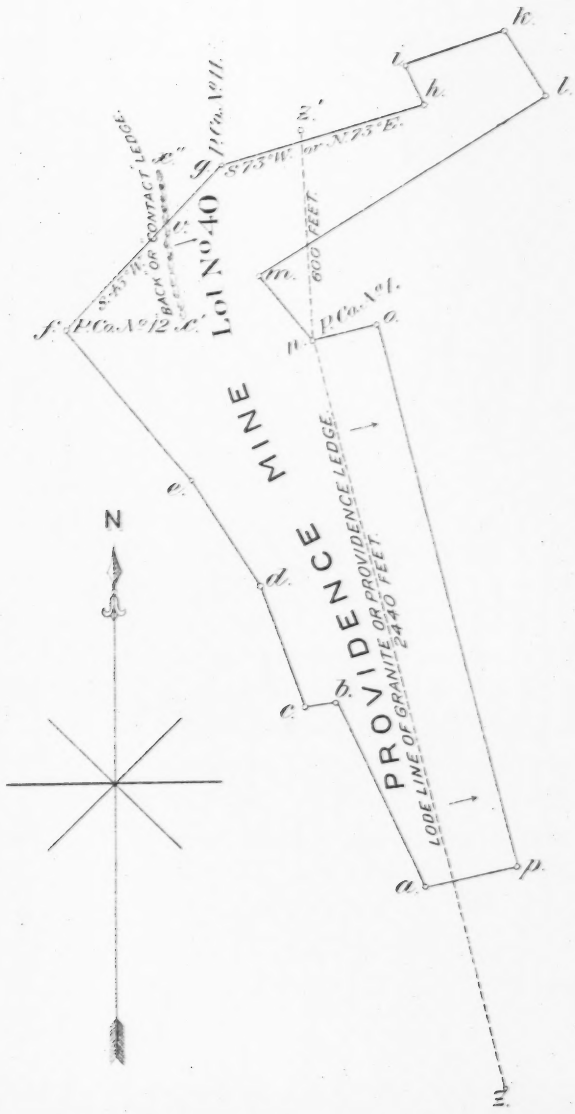
This back or contact ledge marked on the diagram (Fig. 2) x′–x″ crosses on its southerly onward course the Providence boundary line f–g at the point v. Its continuous course southerly is definitely established as far as the point x′. Beyond that point its course is a controverted question, although of no overshadowing importance. The course of the line f–g is S. 43° W. or N. 43° E.

This back of contact ledge, so far as it has been developed within the Providence lines, is admitted to be practically parallel to the granite ledge, and, so far as known, they descend into the earth on practically parallel planes (trans., p. 133).

Fig. 3, inserted following Fig. 2, opposite this page, is a vertical section drawn through the Providence Shaft and will illustrate the relative position of the two ledges as they descend into the earth.

The Providence has reached the contact or back ledge by means of two cross cuts driven through the country rock from the 600 and 1250 levels of the main shaft on the granite ledge, and all the Providence workings on the back ledge are reached by means of this shaft and the

FIG. 2.


Lot No 40
MINE
PROVIDENCE
LODE LINE OF GRANITE OR PROVIDENCE LEDGE.
2440 FEET.
BACK OR CONTACT LEDGE.
600 FEET.
N
J.W.D. Jensen, del.

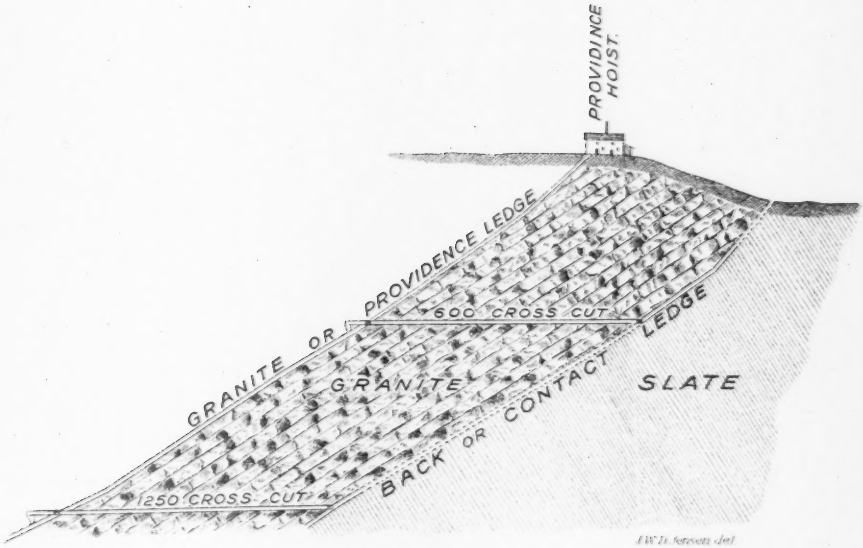

PROVIDENCE HOIST.
GRANITE OR PROVIDENCE LEDGE
600 CROSS CUT
GRANITE
SLATE
BACK OR CONTACT LEDGE
1250 CROSS CUT

FIG. 3.

two cross cuts (trans., p. 141). The horizontal distance between the two veins is approximately 500 feet.

CONTENTION OF THE PARTIES AS TO PETITIONER'S RIGHTS AND THE DECISION OF THE COURT BELOW.

As will be shown later on, the Champion Mining Company, respondent, is the owner of a segment of this back or contact ledge traversing its New Years and New Years Extension Mines, which partially adjoin the Providence boundary line f–g, and the controversy arose over the bounding plane which should define the rights of the respective parties on this ledge underneath the surface.

The diagram marked Fig. 4, inserted opposite page 10, will illustrate the contention of the parties.

Petitioner contended that as the back ledge crosses the line f–g (*vide* Fig. 4), that line becomes in law an end line, and the vertical bounding plane should be drawn through the line f–g, and that line produced indefinitely in the direction of g'.

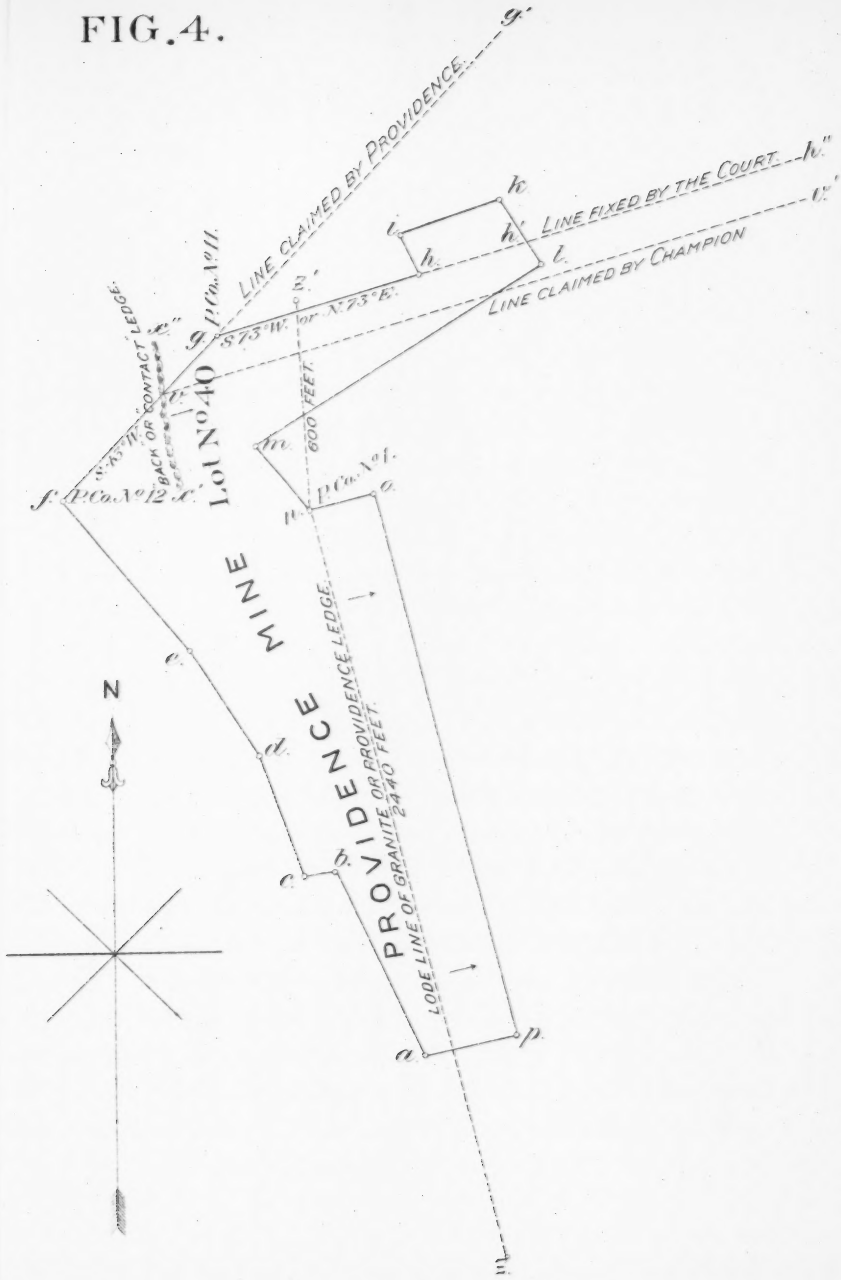
Petitioner also contended that the line f–g was acquiesced in by respondent as a common boundary, and by reason of certain acts of its agents,

respondent is estopped from disputing petitioner's claim to the bounding plane drawn through f–g, and that line produced indefinitely in the direction of g'.

The respondent contended in the court below that petitioner's rights on all ledges apexing within his boundaries must be fixed with regard to the end lines of his *location*, and their general direction, as described in the patent and delineated upon the map accompanying it; that the only lines appearing upon his plat (see Fig. 1, opposite page 6) which at all fulfill the natural or legal definition of end lines are the lines crossed by the lode z–z', to wit, g–h and a–p, and they must be construed to be the lines referred to in the Act of 1872, "as the end lines of their location;" that the rule enunciated by the Circuit Court of Appeals, Ninth Circuit in *Tyler* vs. *Sweeney*, 54 Federal Reporter, 284, is applicable to this case, and affords the only consistent legal solution of the controversy between the parties.

This rule would apply the line g–h (*vide* Fig. 4, opposite this page with a course S. 73° W. or in the direction of the dip N. 73° E. at the point V, where the ledge in controversy on its course southward crosses the boundary line f–g. This application would give us a bounding plane through V-V', and that line produced indefinitely in that direction.

FIG. 4.


LINE CLAIMED BY PROVIDENCE
LINE FIXED BY THE COURT
LINE CLAIMED BY CHAMPION
S. 73° W. for N. 73° E.
600 FEET.
BACK OR CONTACT LEDGE.
LOT No 40
MINE
PROVIDENCE
LODE LINE OF PROVIDENCE LEDGE OR GRANITE
2440 FEET.
N
J.W.D. Jensen del.

The trial court differed with both parties, and entered a decree fixing a bounding plane to be drawn through the line f–g to its intersection with the line g–h and thence N. 73° E. through the line g–h, and that line produced indefinitely in the direction of h'–h", thus awarding petitioner all that portion of the ledge within the Providence ground lying respectively southeast and south of said planes (decree, trans., p. 80), and the Circuit Court of Appeals practically affirmed this decree (see decision at end of trans. of record).

TITLE OF RESPONDENT AND LOCUS OF THE ALLEGED TRESPASS.

The respondent is the owner of two mining claims commonly known as the New Years and New Years Extension Mines, and designated in the office of the U. S. Surveyor-General for California as Mineral Lots 182 and 183, respectively. Its title is evidenced by a certificate of purchase issued October 4, 1890, by the Receiver of the U. S. Land Office at Sacramento (see stipulation, trans., pp. 261–263).

This certificate of course, is equivalent to a patent, and it was so admitted by petitioner's counsel at the trial (trans., p. 201).

It was admitted by counsel for respondent that all *its* rights to the ledge in controversy

and to the mines above named accrued by virtue of locations made subsequent to the passage of the Act of May 10, 1872.

The diagram marked Fig. 5, inserted opposite this page, will show the boundaries of the different mining claims involved and the relative situation of the properties of the contending parties, the course of the "Back," "Ural" or "Contact" Ledge through them, the underground workings of both petitioner and respondent on this ledge, and the operation of the bounding planes contended for by the respective litigants and those fixed by the trial court, and will enable us to explain the situation as it was presented to the trial court with reference to the alleged encroachment of the respondent on the asserted rights of petitioner.

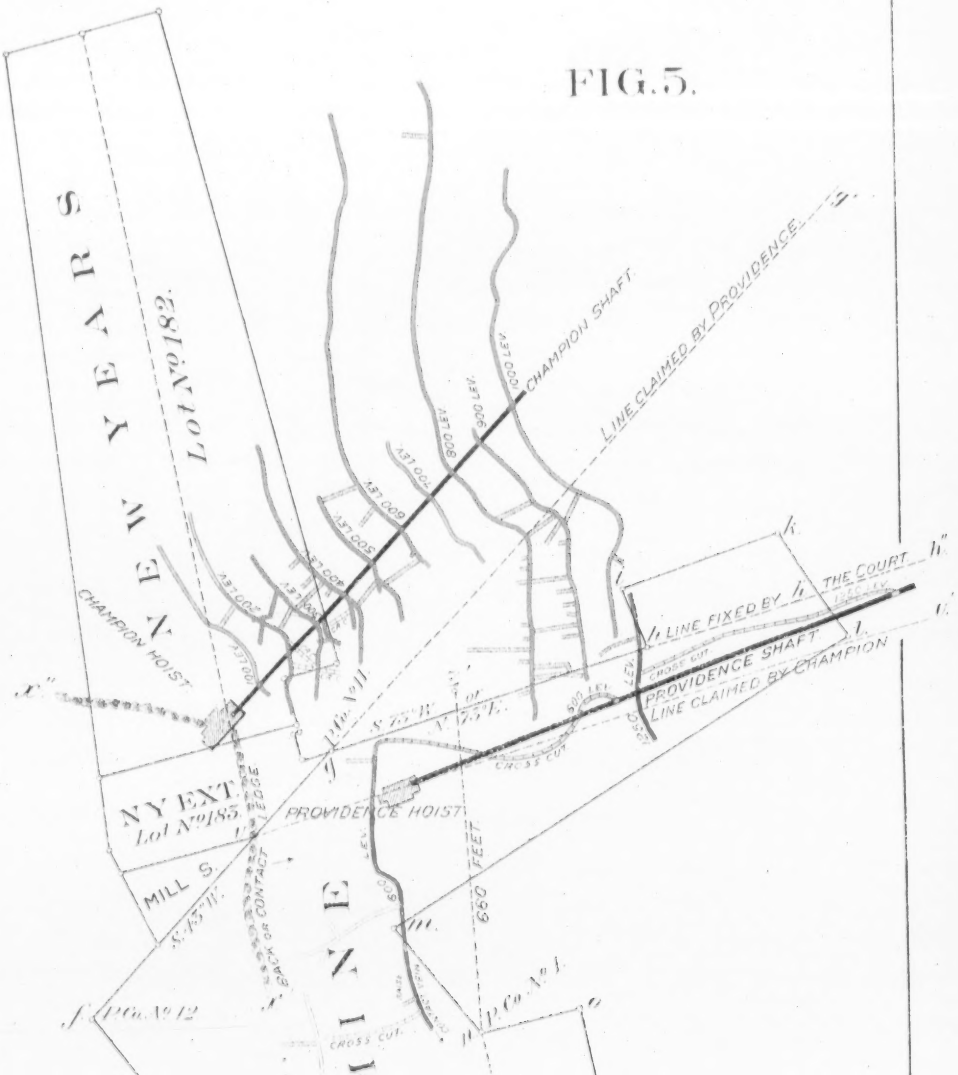
This figure 5 may be termed a horizontal projection, and is a composite compiled from the various exhibits used at the trial and on the argument before the Circuit Court of Appeals.

From this diagram (Fig. 5) it will be observed that the ledge in controversy enters the west side line of the New Years (Lot 182), passes through the collar of the Champion shaft (which is sunk on the ledge), and then crosses the north end line of the New Years extension lot 183, traverses this lot and passes out of and through the south end line at the point "V" into the

Providence. The two end lines of the New Years extension are parallel, and that they are both crossed by this ledge is established by the testimony of the engineer C. E. Uren (trans., p. 162–164).

The drifts colored red extending northerly and southerly from the Champion shaft are the various levels extended underneath the surface on the vein in controversy, the shaft following the vein on its downward course. The yellow lines in the Providence denote the two cross cuts extending west from the shaft on the Providence Ledge through the granite to the back or contact ledge as shown heretofore on the vertical section (see Fig. 3, p. 8). The blue lines indicate the various drifts and levels extended by the petitioner and his grantors on the ledge in dispute. The alleged trespass in this action consists in the extension by the respondent of its levels southerly across the bounding plane drawn through the line f–g produced in the direction of g', and in extracting ore from the vein on the southeasterly side of said bounding plane. It will be observed that none of the underground workings of the Champion penetrate the bounding plane contended for by it, drawn through the line v–v', and that it has extended two of its drifts a short distance only beyond the bounding plane fixed by the Court.

FIG. 5.


NEW YEARS
Lot No 182.
CHAMPION SHAFT
LINE CLAIMED BY PROVIDENCE
CHAMPION HOIST
LINE FIXED BY THE COURT
PROVIDENCE SHAFT
LINE CLAIMED BY CHAMPION
N Y EXT.
Lot No 183
PROVIDENCE HOIST
MILL S.
S 45° E.
BASE OF CONTACT
660 FEET
CROSS CUT
500 LEV.
1000 LEV.
1st COURSE
2nd COURSE
3rd COURSE
4th COURSE
5th COURSE
6th COURSE
7th COURSE
8th COURSE
9th COURSE
10th COURSE
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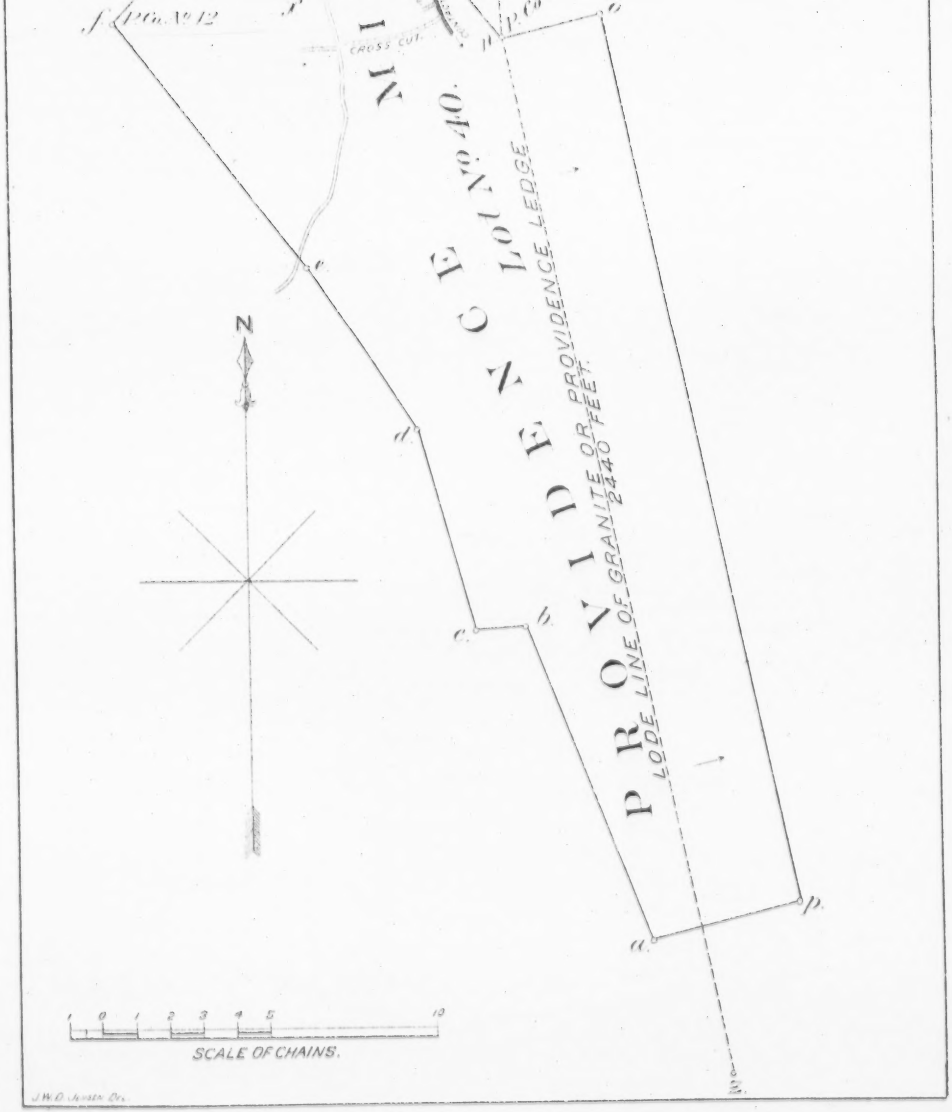
97th COURSE
98th COURSE
99th COURSE
100th COURSE


Prov. No 12
CROSS CUT
MINE
PROVIDENCE LODE No 40.
LOT
PROVIDENCE LODE
LODE LINE OF GRANITE OR PROVIDENCE LEDGE
2440 FEET.
N
0 1 2 3 4 5 10
SCALE OF CHAINS.

An examination of figure 5 also discloses the fact that the end line plane established by the Court g–h′–h″ deprives the petitioner of a small segment of the ledge underneath the surface which would be intersected by vertical planes drawn through the lines of the parallelogram h–i–k–h′. This parallelogram overlies a portion of the vein on its dip, and the court below awarded this portion to the respondent, for the reason that these surface boundaries were beyond the end line of petitioner's location (g–h), and that this segment of the ledge was reserved by the patent and the mining laws, and was subsequently granted to the petitioner as the owner of the overlying apex, with the privilege of pursuing the vein on its dip or downward course underneath this parallelogram.

THE LAW.

Petitioner's grantors originally located 3,100 feet of the Providence or Granite ledge z–z′. The Providence patent purports to grant " 3,100 " linear feet of the Providence Ledge with surface " grounds as hereinafter described," as shown in figure 1 opposite p. 6 of this brief. The length of the lode between points of intersection with the lines g–h and a–p is only 2,400 feet.

It is claimed by petitioner that the principal thing patented is the lode; that the northern limit

of petitioner's right upon the lode is at the point z', 30 feet north of the line g–h, and the southern limit 670 feet south of the line a–p; that the patented surface area was simply granted for convenient working purposes, and the lines of such surface, however they might have been constructed, could not abridge or limit the right upon the ledge; that although the lines g–h and a–p are crossed by the lode in its course or strike, and are substantially parallel to each other, they cannot be considered as end lines, because they do not bound the extremities of the lode right of 3,100 feet; that such lines do not perform the function of end lines as applied to the granite ledge acquired under the Act of 1866, and, therefore, should not be considered as factors in determining petitioner's rights upon the contact ledge x'–x'', which came to him by the grace of the Act of 1872.

That any line of the many-sided figure of the location which may be fortuitously crossed by a a ledge on its onward course other than the patented ledge becomes, from the fact of such crossing, an end line, not simply for the purpose of defining the right to pursue the vein on its strike, but also for the purpose of defining and regulating the dip rights and extra lateral privileges, and is to be produced indefinitely in its own direction

This leads us to the discussion of the law and the decisions thereunder.

I.

As to petitioner's rights to the "Granite Ledge" under the Act of 1866 and the patent issued thereunder, and the relationship between that lode and the surface boundaries of the "location."

We are not directly concerned with the pursuit of the granite ledge z–z′ after it leaves the surface boundary lines of the Providence location. A discussion of the rights asserted by petitioner thereto is simply incidental to the main issue.

That he cannot follow it on its course beyond the surface boundaries is no longer an open question.

McCormick *vs.* **Varnes, 2 Utah, 355.**
S. C., 9 Morrison's Reports, 505.
Flagstaff *vs.* **Tarbet, 98 U. S., 463.**
Wolfley *vs.* **Lebanon Mining Co., 4 Colo., 112.**

The patents in all these cases were similar in terms to the Providence patent under consideration in this case.

Whatever may have been the rights under the original locations by virtue of the miner's rules and customs, the patent sought for and obtained is the measure of petitioner's rights.

Under this patent the lines g–h and a–p are end lines on the granite ledge—the *end lines* of *the location*,—beyond which petitioner is not permitted to go on either strike or dip.

As was said by this Court in the **Flagstaff case**, *supra* :

"We think that the intent of both statutes "(1866 and 1872) is, that mining locations of "lodes or veins shall be made thereon length-"wise in the general direction of such veins or "lodes on the surface of the earth where they "are discoverable, and that the end lines are to "cross the lode and extend perpendicularly "downward."

In this view the lines g–h and a–p are ideal end lines, and, considered in connection with the ledge originally patented which crosses them, they are the only lines of the location which could in any way be treated as end lines at the time the Act of May 10, 1872, was passed, granting to the patentee the *other* ledges apexing within the lines of the Providence location.

II.

As to petitioner's rights upon the "Back" or "Contact" Ledge under the Act of 1872, and the relationship between that ledge and the surface boundaries of the "location."

Whatever rights upon the contact ledge petitioner may have, they all accrued to him by virtue of the following provisions of the Act of May 10, 1872.

"The locators of all mining locations hereto-
"fore made or which shall hereafter be made, on
"any mineral vein, lode or ledge, situated on
"the public domain, their heirs and assigns,
"where no adverse claim exists on the tenth day
"of May, eighteen hundred and seventy-two, so
"long as they comply with the laws of the
"United States, and with State, Territorial and
"local regulations not in conflict with the laws
"of the United States governing their possessory
"title, shall have the exclusive right of posses-
"sion and enjoyment of all the surface included
"within the lines of their locations, and of all
"veins, lodes and ledges throughout their entire
"depth, the top or apex of which lies inside of
"such surface lines extended downward verti-
"cally, although such veins, lodes or ledges may
"so far depart from a perpendicular in their
"course downward as to extend outside the ver-

" tical side lines of such surface locations. But " their right of possession to such outside parts " of such veins or ledges shall be confined to " such portions thereof as lie between vertical " planes drawn downward, as above described, " through the end lines of their locations, so con- " tinued in their own direction that such planes " will intersect such exterior parts of such veins " or ledges. And nothing in this section shall " authorize the locator or possessor of a vein or " lode which extends in its downward course be- " yond the vertical lines of his claim to enter " upon the surface of a claim owned or possessed " by another."

Act of May 10, 1872, sec. 2.

Sec. 2322, U. S. Rev. Statutes.

The terms of this Act give to the petitioner only that portion of the contact ledge, throughout its entire depth, the *top* or *apex* of which lies inside of the surface lines of his location extended downward vertically *and between vertical planes drawn downward through the end lines of his location.*

What were the *end lines* of that location at the time the Act of 1872 was passed and to which the Act referred? Certainly not the line f–g, as this line was established long before as a surface boundary—not intersected or touched by the granite ledge—and not performing any functions

of an end line. Certainly not at the termination of the 3,100 feet at z', as no end line is there established, and, if it is implied, its length is simply the width of the vein, and there is no overlying apex of the back vein found within any surface bounded by such hypothetical end line.

It seems so obvious to us that the line g–h is the *end line* of the location referred to in section 3, of the Act of May 10, 1872, that we can see no necessity for argument.

But petitioner asserts that because the back or contact ledge crosses the line f–g that line becomes an end line, and he is entitled to produce it indefinitely in the direction of g'. This course of reasoning involves him in this absurdity. He has an end line plane somewhere on the granite ledge. Either the line g–h, or an imaginary one, whose length is the width of the lode, drawn at right angles to the course of the vein at z'. His contention would give him, in addition to this, another and altogether different end line plane on the back vein, the line f–g, and that line produced indefinitely, and, if any other veins should be discovered passing out of any of the other numerous surface lines, each one of these lines would become an end line, to be produced indefinitely in its own direction, and he would have as many different end line planes as he has surface boundaries crossed by a ledge.

This is manifestly ridiculous.

Let us illustrate another result of petitioner's contentions with the use of a diagram.

We reproduce figure 2 with certain additional elements, not, however, in any respect modifying the lines of the location or changing the position of anything within those lines.

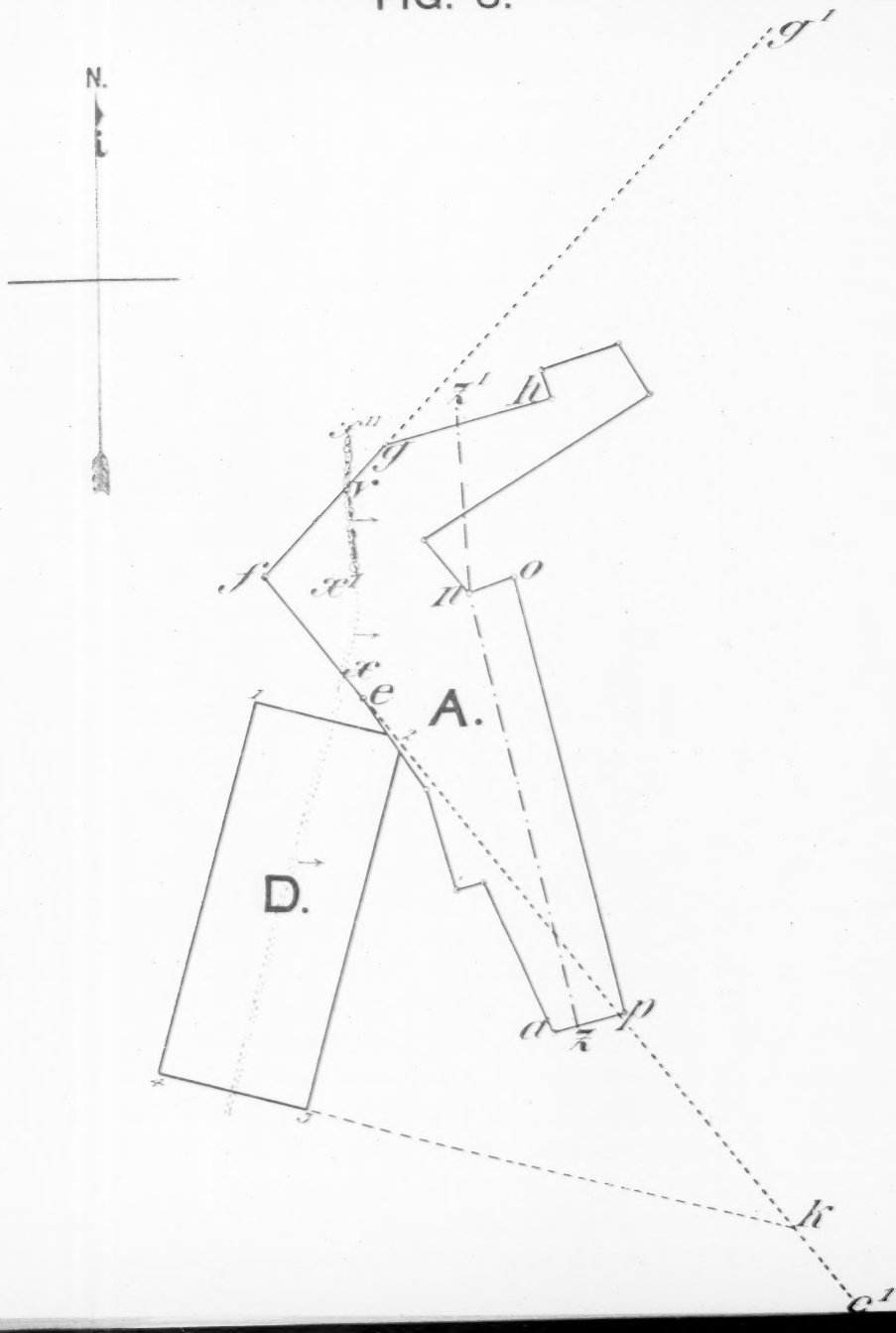
In figure 6 (see next page), we have the Providence location A, with the contact ledge x'–x" crossing the line f–e, at an assumed point x, and extending on its course through an assumed location D.

There was some evidence introduced at the trial tending to show that the ledge passes out of the line f–e, approximately at the point x. But we are now dealing with this as an hypothesis.

The location "D" is under the Act of 1872, and, of course, junior in point of time to "A." D is a regular valid location, covering 1,500 feet of the apex of the ledge x–x'–x". The end lines are parallel to each other and crosswise of the lode.

If the petitioner's theory is correct, that his northerly bounding plane is to be drawn through f–g–g', it follows as a corollary that the same rule is to be applied to the crossing on the line f–e at x. He will, therefore, have all the segment of the contact ledge lying between vertical planes drawn through the lines f–g–g' and f–e–k–e', and those lines produced indefinitely.

FIG. 6.



Say the length of the ledge x–x'–x" within the surface lines of his location f–g and f–e is 700 feet, the dip being in the direction of the arrows. Petitioner follows the ledge on its downward course between vertical planes drawn as above stated.

When he reaches 2,000 feet in depth on the downward course of the vein, he has *five thousand linear* feet of the ledge between the points g' and e' with a surface *apex* of only 700 feet.

"D" who has a regular valid location, within 1,500 feet of the apex, could on plaintiff's theory take nothing below the plane drawn through e–k–e'.

Can petitioner seriously contend that Congress intended to grant him any such extraordinary rights?

No locator under the Act of 1872 could acquire any such privilege. Can it be said that that Act gave to the petitioner on the contact ledge a greater right and a larger privilege than it was *possible* to obtain with a similar form of location made under the Act itself?

Suppose that nature had so created the contact fissure that its dip was *west* instead of *east*, and that in its downward course it passed under the lines f–g and f–e!

The rule of law invoked by petitioner is non-elastic. It is not affected by geological conditions or the freaks of nature.

Applied to his location, with the vein dipping in the opposite direction from that indicated by the arrows on the diagram, with 700 feet of apex, his dip right would be limited to planes drawn through f–g and f–e, where he now insists that they should be drawn, if our hypothesis is correctly assumed.

Petitioner is in no stronger position if we assume that the ledge x''–x' on its southerly course passes southerly through the entire length of the Providence location, crossing the line a–p. With this state of facts assumed, a production of the plane f–g in the direction of g' would lead to the same iniquitous results only in a lesser degree.

The end line cases, in which the courts generally announce the doctrine that where a vein in its course crosses side lines those lines become end lines, are all cases where the vein crosses two parallel lines.

Flagstaff *vs.* **Tarbet**, 98 U. S., 463.
Argentine *vs.* **Terrible**, 122 U. S., 478.
King *vs.* **Amy—Silversmith Case**—152 U. S., 222.

Speaking of these cases, Judge Hallett in a very recent case, says:

"These decisions do not affirm that all lines "of a location crossed by a lode on its strike

" shall be end lines. The most that can be de-
" duced from them is that opposite lines parallel
" to each other when crossed by the lode are end
" lines."

Del Monte M. & M. Co. *vs.* **New York L. & C. Co.**, 66 Fed., 215.

And this Court, in the recent case of **Last Chance Min. Co.** *vs.* **Tyler**, 157 U. S., 683, asserts that these cases do not determine the rule to be applied where a vein crosses an end line and a side line.

And there is no adjudicated case which determines that a side end line may be indefinitely produced in its own direction.

The side line crossed by a ledge performs the function of an end line to the extent of stopping the further pursuit of the vein on its strike, and this is the extent only to which the decision of the courts have reached.

In the case of the **Iron S. M. Co.** *vs.* **Elgin M. Co.**, 118 U. S., 208, Justice Field delivering the opinion of the Court, says:

" It often happens that the top or apex of more
" than one vein lies within such surface lines,
" and the veins may have different courses and
" dips, yet his right to follow them outside of
" the side lines of the location must be bounded
" by planes drawn vertically through *the same*

"*end lines*. The planes of the end lines cannot be "drawn at right angles to the courses of all the "veins if they are not identical."

Judge Hawley, in his opinion in the case at bar, quotes the above citation, adopts its reasoning, and thus sums up the case:

"It necessarily follows that the end lines of "the Providence survey must be considered by "the Court as the end lines of any and all other "lodes or veins which lie inside of such surface "lines."

Trans., p. 90.
63 Fed., p. 557.

"In the present case the end lines of the "Providence—*a–p* and *g–h*—are conceded to be "substantially parallel with each other, and that "the Providence lode in its course lengthwise "passes these end lines. Complainant's contention would take the 'back' or 'contact' vein "outside of the plane of the northerly end line "of the Providence drawn downward vertically, "and give to him extra lateral rights not granted "by the patent nor given to him by the granting "provisions of the Act of 1872."

Trans., p. 91.
63 Fed., p. 558.

How the contention of the petitioner, if permitted to prevail, would violate this cardinal

principle is, we respectfully submit, clearly demonstrated by an examination of figure 6, and a consideration of the reasoning applied to it.

The decree of the trial court as affirmed by the Circuit Court of Appeals in the case at bar dealt liberally with petitioner in fixing his bounding plane on the back or contact ledge through the line f–g. This is such segment of the ledge "as lies between vertical planes drawn down-"ward * * * through the end lines of their "location," and is that segment *donated* to petitioner by the generosity of the Act of 1872.

We think it clearly established that the end line plane, fixed by the Circuit Court of Appeals, is an application of a principle of law recognized uniformly by the courts, and that there are no conflicting decisions upon the subject to be reconciled or harmonized by the Court.

Two questions remain to be considered:

1. As to the alleged estoppel inhibiting the respondent from disputing the plane through the line f–g–g′ as a bounding plane.
2. As to the right of respondent to follow the contact ledge on its downward course underneath that portion of the Providence surface lying north of the bounding plane fixed by the decree.

III.

As to the alleged estoppel.

As to this branch of the case it certainly cannot be said that the question is either grave or important or that there are conflicting decisions of the courts to be harmonized by this Court.

There was no mention of this in the assignment of errors presented to the court of appeals. The trial court dealt with it in its opinion, but the appellate tribunal did not consider it of sufficient importance to refer to it.

The evidence relied upon to establish a so-called estoppel is found in the record.

This evidence consists of recitals in a relocation made by respondent's agents, called the New Years Extension Relocation, certain proceedings of the Board of Directors of Respondent, and some parol testimony of an indefinite nature.

The relocation containing the recitals relied upon is found upon pages 31 and 32 of the transcript.

It may be accepted as a fact that the location of the New Years Extension, as originally made on the surface, overlapped and conflicted with the Providence patented ground, crossing the line f–g, the conflict area consisting of a small triangle, covering a small segment of the contact lode within the Providence ground.

The avowed purpose of this relocation was "to correct errors of description of said original "notice and to conform said description to the "actual boundaries of said mine and to the re-"quirements of the law."

Trans., p. 31.

The notice of relocation also contained the following recital:

"And, whereas part of this claim as origi-"nally described and as hereby relocated con-"flicts with the rights granted by the letters "patent of said Providence Mine, said lot 40, "now, therefore, so much of this claim, both for "lode and surface ground, as originally conflicted "or now conflicts with any portion of the sur-"face or lode claims or rights granted by said "patent, is and are hereby abandoned, which "portion of this claim so abandoned is described "as follows, to wit: All that portion of the "above-described New Years Extension claim "for surface and lode which lies south of the "northern boundary line of said Providence "mine, which runs N. 43 deg. 10 min. E., across "the southeastern corner of this claim."

This relocation is dated November 15, 1884.

With reference to this notice of relocation the attention of the Court is invited to the following facts:

The portion of the surface and lode abandoned is that portion which *was granted to the Providence Company by the Providence patent.* It did not purport to yield or surrender to the Providence Company anything which was not already covered by their patent. The Providence Company was not a party to the instrument. It is in no sense an end line *agreement* as in the **Eureka** case, 103 U. S., 839. It was simply a recognition of the line as a common surface boundary, and an acknowledgment that the Providence owned such portion of the contact ledge as was granted by their patent and the subsequent Act of Congress. That is the length and breadth of it.

In addition to this it ante-dated by six years the acquisition by respondent by certificate of purchase of the title to the New Years Extension, the certificate having been issued October 4, 1890. Even if the relocation could be possibly distorted into anything like an equitable estoppel, the estoppel only operated upon such title as respondent then had, and did not control title subsequently acquired.

Russell *vs.* **Brosseau**, 65 Cal., 605.
Montgomery *vs.* **Whiting**, 40 Cal., 294.
Thrift *vs.* **Dulaney**, 69 Cal., 189.
Caperton *vs.* **Schmidt**, 26 Cal., 513.
Mahoney *vs.* **Van Winkle**, 33 Cal., 448.

Reed *vs.* **Calderwood**, 32 Cal., 109.
Amesti *vs.* **Castro**, 49 Cal., 325.
Merryman *vs.* **Bourne**, 9 Wall., 592.
Erwin *vs.* **Garner**, 9 N. E., 417.

The entry and payment to the Government and the issuance of a certificate of purchase is a newly acquired title.

Hamilton *vs.* **Sierra Nev. G. & S. M. Co.**, 13, Saw., p. 113.
Thrift *vs.* **Dulaney**, 69 Cal., 191.

A relocation of the same mining claim has been held to be a newly acquired title.

Russell *vs.* **Brosseau**, 65 Cal., 605.

A patent issued upon a Mexican grant is a newly acquired title, although the inchoate right to a patent existed at the time of the treaty of cession.

Amesti *vs.* **Castro**, 49 Cal., 325.
Merryman *vs.* **Bourne**, 9 Wall., 592.
Wilkins *vs.* **McCue**, 46 Cal., 656.

If the abandonment included anything not covered by the Providence patent, it was an abandonment to the Government, and not to the owners of the Providence, and the subsequent deed of the Government conveyed the title to the petitioner, and the Providence owners have no cause of complaint.

The trial court held that this abandonment did not give to the Providence any greater rights than it previously had (opinion, trans., p. 93), thus obviating the necessity of passing upon the question of subsequently acquired title. So much for the so-called "agreement," which is in no sense an agreement. Nor does it possess any of the essential elements of estoppel.

In the record as well as upon the maps of petitioner, mention is made of the "Annex" location. It cut no figure in the case. It had nothing to do with respondent's title to the "New Years Extension." It was like many other locations in the mining regions whose life is a year and a day.

As to the records of the corporation introduced on the question of supposed estoppel, they will be found in the transcript at pages 175 and 176. They establish the authority to make necessary relocations, and as the reports from the mine were "of an unsatisfactory and incomprehensible nature," the superintendent, Mr. Vincent, was sent to the mine and authorized to use his own discretion in regard to the work to be prosecuted, and to stay there such a length of time as he may consider necessary.

From this counsel for petitioner wish to infer authority delegated to Vincent to agree upon a bounding plane. If such a construction could

be possibly placed upon the action of the Board of Directors, Vincent never attempted to exercise any such authority.

Mr. Vincent was permitted to testify under respondent's objection that he laid out the Champion shaft parallel to the line f–g—which is the only way any sane man would lay it out,—and that he told Richard Walrath, brother of petitioner, that so long as he was superintendent he would respect the line f–g.

This is all there is in the record to support the alleged estoppel.

Certainly Vincent had no implied authority to assent to any boundary line.

Overman S. M. Co. *vs.* **American S. M. Co.,** 7 Nev., 312.

If he did, as before observed, he never attempted to exercise it. In any event mining companies are not to be divested of their rights in any such loose and equivocal way. An agent may in some cases, acting within the scope of his authority, bind a corporation. But the existence of such authority and its extent must be shown, not by the testimony of the agent, but by the action of the Board of Directors duly convened and acting as a Board, as evidenced by the records of the company.

IV.

As to the right of respondent to follow the Contact Ledge on its downward course underneath that portion of the Providence surface lying north of the bounding plane fixed by the decree.

This brings us to a consideration of the respondent's right awarded by the decree to pursue the contact ledge on its downward course underneath that portion of the Providence surface, lying north of the bounding plane fixed by the trial court, through the line g–h–h'. This portion of the surface, underneath which respondent is permitted to follow and extract the contact ledge, is delineated on the surface on figures 4 and 5, as a parallelogram bounded by the lines h–i–k–h'.

Petitioner has no right to this segment of the ledge, for the reason that he has no apex overlying it within the lines of his location, as it lies wholly outside of and beyond the plane drawn through the *end line* of his location. It is as to the Providence a part of the *strike* of the vein, lying beyond his end line. Petitioner being the plaintiff has the affirmative of the issue, and is compelled to establish his right to all portions of the vein in dispute. He has shown no right to this segment because of its position with reference to his end lines.

It will be contended that petitioner is entitled to everything lying within vertical planes drawn through all of his surface lines—the Providence being the prior patent.

Counsel for petitioner in the court below laid some stress upon the following language of this Court used in the **Argentine-Terrible** case, 122 U. S., 478:

"Assuming that on the same vein there were "surface outcroppings within the boundaries of "both claims, the one first located necessarily "carried the right to work the vein."

And in the **Tyler-Sweeney** case, 54 Fed., at page 295:

"In cases of controversy, where the right "exists under valid location to follow the lode "in its downward course, it necessarily follows "that both locations cannot rightfully occupy "the same space of ground. And in all cases "where a controversy of this kind arises the "prior locator must prevail precisely as in cases "of like controversy between locations overlap-"ping each other on the course of the ledge."

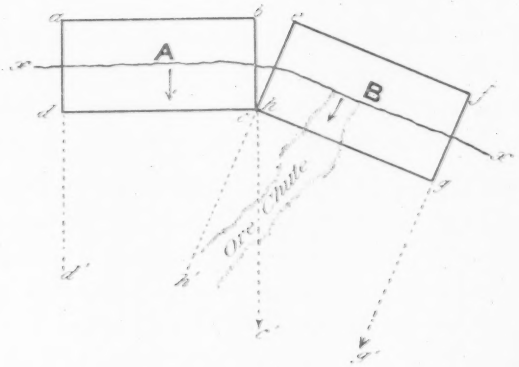
The doctrine enunciated in these two cases establishes nothing more than the rule that whoever first appropriates, by a regular and valid location, the apex or top of a ledge has the prior right to work the vein on its dip within the vertical planes, constructed according to the re-

quirements of the law with reference to the end lines of his location.

A subsequent locator would not have the right to locate an extension or continuation of the outcrop, and so construct the end lines of his location that vertical planes drawn through them would intersect the vertical end line planes of the prior locator.

The operation of this rule is best explained by an illustration.

FIG. 7.



Upon the diagram (Fig. 7) "A," the prior locator, appropriates by a regular valid location the claim a–b–c–d. The ledge x crosses both of his end lines, a–d and b–c, giving him the

bounding dip planes, a–d–d′ and b–c–c,′ the dip being in the direction of the arrow.

The underground developments made by "A" establish the fact that the pay ore, or "ore chute," pitches in the direction indicated in the diagram, crossing "A's" dip plane b–c–c′.

With this information "B," with a regular valid location, appropriates the claim e–f–g–h. The ledge x crosses both of his end lines, e–h and f–g, which are constructed so that his end line planes will approximately parallel the direction of the "ore chute" in its downward course. Were "B" the prior appropriator, his extra-lateral, or dip rights, would be defined by vertical planes drawn through e–h–h′ and f–g–g.′ But, as "A" is prior in time, "B" cannot follow his ledge on its *downward* course beyond "A's" end line plane b–c–c,′ because, as the Circuit Court of Appeals says, in the **Tyler** case "both locations cannot rightfully occupy the same space of ground," and, of course, priority of appropriation establishes a priority of right.

And this is all that is intended by the cited decisions.

The right to pursue a vein on its downward course underneath the surface of an adjoining proprietor does not depend on priority of title. A junior locator having apex within his location

may follow it on its dip underneath the surface of the senior mining patent.

Colorado Cent. Cons. Min. Co. *vs.* **Turck (C. C. A.)**, 70 Federal, 298.

This segment underlying the parallelogram h–i–k–h', figures 4 and 5, is reserved under the Acts of 1872 and 1866, as well as by the Providence patent. The respondent is the appropriator of the apex of this portion of the vein by a regular valid location, is the owner of the overlying apex within the lines of his location, and is in contemplation of law such a proprietor of a vein, as is permitted under the law, to pursue it underneath that portion of the Providence surface referred to.

Were the Providence title an agricultural patent, the rule might be different. But, having secured a mining title, he takes subject to the exigencies of the mining laws, and subject to the conditions which form the muniments of his title.

The detail and length of the foregoing argument may be open to the criticism that it is more the presentation of respondent's case on the merits than in support of the objection to the issuance of the writ applied for. But in

order to determine whether or no the case presented is such as will warrant this Court in issuing a writ of *certiorari* it becomes necessary to examine the record. Such examination may be aided by a presentation to this Court of respondent's views and theories as they were presented to the Circuit Court of Appeals.

We respectfully submit that the application for the writ should be denied.

Respectfully submitted,

CURTIS H. LINDLEY,
Solicitor for Respondent.

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No. 965

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

AUSTIN WALRATH, PETITIONER,

vs.

CHAMPION MINING COMPANY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

SMITH & MURASKY,
Counsel and Solicitors for Petitioner.

P. REDDY,
Of Counsel.

JAMES H. BARRY, PRINTER, 428 MONTGOMERY ST., S. F.

IN THE SUPREME COURT

OF THE

UNITED STATES.

AUSTIN WALRATH,

PETITIONER,

vs.

CHAMPION MINING COMPANY,

RESPONDENT.

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit to Certify to the Supreme Court for Review the Record in the Case of Austin Walrath vs. The Champion Mining Company.

To the Honorable, the Supreme Court of the United States:

The parties herein are owners of coterminous mining claims on the same ledge and the controversy between them is one of end line.

There is no dispute whatever between them as to surface boundaries, but only a disagreement between them as to what bounding planes drawn downward vertically shall mark the limit of their pursuit of the "Contact" ledge on its course or strike.

The Providence Mine, owned by petitioner, was located in 1857 on what was then and is now known as the "Providence Ledge" by thirty locators, each of whom located one hundred linear feet, except the discoverer, who was entitled to locate and located one hundred feet additional.

By proper conveyances the title of these thirty locators to the "Providence" ledge was vested in the Providence Gold and Silver Mining Company, which, on the 28th of April, 1871, procured from the United States a patent therefor, together with certain surface ground described therein (see U. S. Patent, Complainant's Exhibit 5, Transcript, page 250).

The title thus granted to the Providence Gold and Silver Mining Company was, before the commencement of this suit, vested in the petitioner, Austin Walrath.

By the special provisions of the patent but one ledge, the Providence Ledge, was granted in its entire depth for the distance of thirty-one hundred linear feet along its course. All other ledges within the surface ground particularly described were by the patent expressly reserved.

Afterward, by the Act of Congress, passed May 10th, 1872, the exclusive right to the possession of the surface ground described in said patent, *and to all other ledges the tops or apexes of which lie within the surface lines, as particularly described in said patent*, was granted to the owners of the said Providence Mine. It will be observed that the ledges expressly reserved by the patent are the ledges *expressly granted* by the Act of 1872, and by its terms the petitioner acquired his rights to the "Contact" ledge, a portion of which is in controversy in this action.

This ledge, as shown by the record, extends across the boundary line between the Providence and Champion Mining Claims, known as the line running south 43 degrees west, and enters the Champion ground, and after pursuing a general northerly course therein for some distance, passes out of the Champion Mining Claim through its westerly side line (see diagram A, opposite page 2).

On the 29th day of September, 1877, the respondent, the Champion Mining Company, made a location called the New Year's Extension Mine on the "Contact" ledge, and, as located, there was an overlap both for surface and lode on the Providence Mine—that is, the lode line and surface lines of said location extended to the south of the line designated in the Providence patent as running south, 43 degrees west, and which line the "Contact" vein crosses on its southerly strike into the Providence.

The overlap on the Providence Mine is shown by "Diagram B," opposite page 4.

The surface overlap is colored yellow, and the lode overlap can be readily seen by glancing at the lode line H. R.

In the year 1884, the petitioner and his co-owners objected to the overlap, and demanded of the Champion Mining Company that it abandon all claims to the surface and lode to the south of the Providence boundary line, described as running south 43 degrees W. Thereupon, and in the month of November in the same year, John Vincent, the superintendent of the respondent, the Champion Mining Company, under the authority and under the direction of the company, relocated the New Year's Exten-

sion Mine by a notice of relocation, in which the fact of the overlap under the original location was particularly recited, and the lines were readjusted to the said line of the Providence Mine, running S. 43 degrees W. (see Transcript, pages 175–177, and pages 30, 31 and 33, and pages 154, 155 and 156).

In the notice of relocation, the lode line was particularly described as follows:

"The lode line of this claim, as originally located, and which "I hereby relocate, is described as follows: Commencing at a "point on the northerly bank of Deer Creek, which point is 80 "feet S., 11 degrees 45 minutes east of the mouth of the New "Year's tunnel, and running thence along the line of the lode "towards the N. E. corner of the Providence mill, about S. 46 "degrees 15 minutes east, 200 feet, more or less, *to a point and "stake on the northerly line of the Providence Mine, patented*, desig- "nated as Mineral Lot No. 40 *for the south end of said lode line*" (see Transcript, pages 30, 31, 32, and 33).

It also contains the following statement:

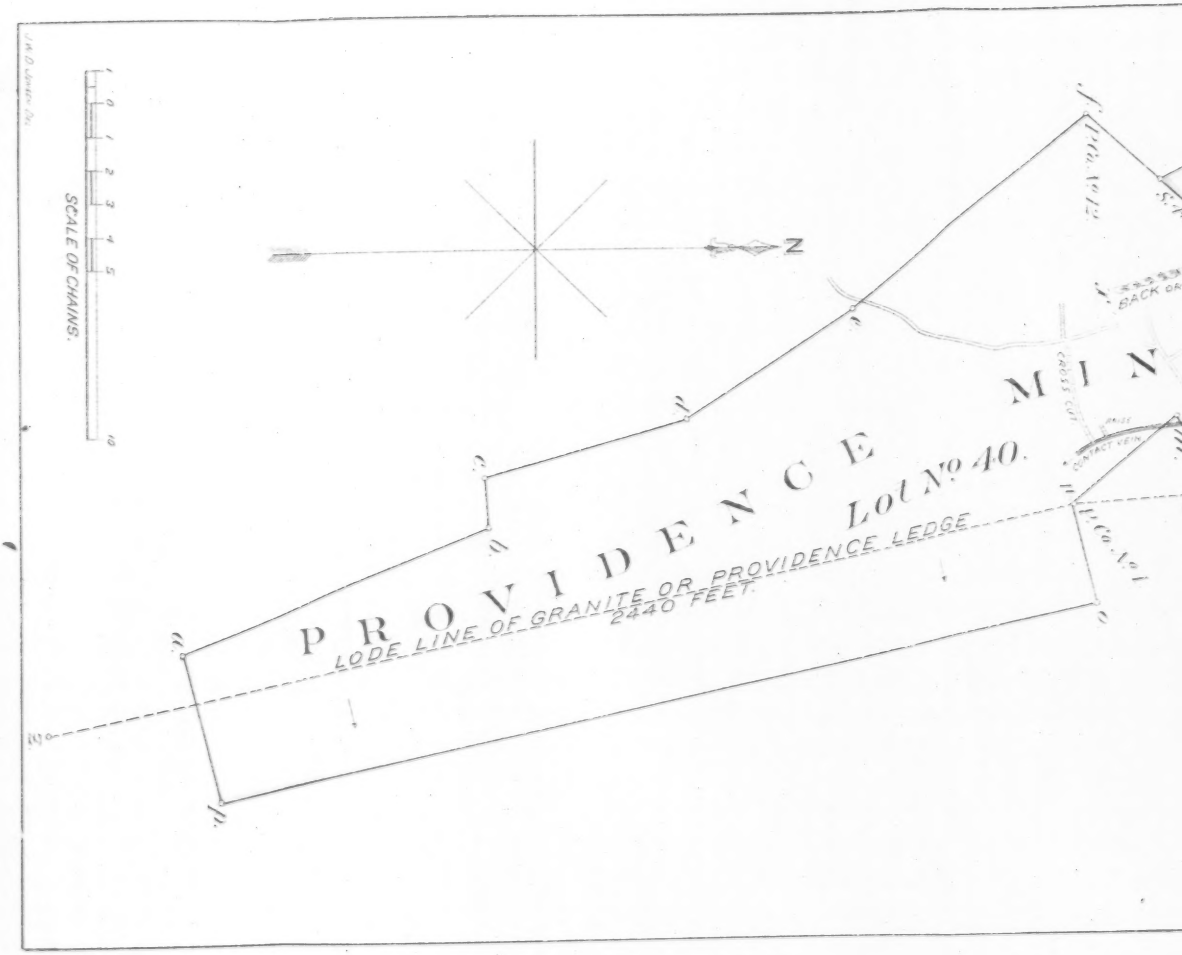
"And whereas, part of this claim, as originally described, and "as hereby relocated, conflicts with the rights granted by the "letters patent of said Providence Mine, said lot No. 40. Now, "therefore, so much of this claim, *both for lode and surface "ground*, as originally designated, conflicted, or now conflicts, "with any portion of the surface, or lode, claims, or rights "granted by said patent, is and are hereby abandoned.

"*Which portion of this claim so abandoned is described as fol- "lows: All that portion of the above described New Year's Extension "Claim for surface and lode which lies south of the northern "boundary line of said Providence Mine, which runs south 43 "degrees ten minutes east across the southeastern corner of this "claim.*" (See Diagram B)

On the 17th day of July, 1879, the Champion Mining Company made a location on the contact ledge called the "Annex "Mine," the southern boundary of which was fixed as running south 43 degrees 10 minutes west *along the northwest boundary of the Providence Mine*, and with the notice of location of the said Annex Mine it filed a map in the office of the County Recorder of the County of Nevada, State of California (see Diagram C and Transcript, pages 256–257 and 258).

The said New Year's Extension relocation and the said Annex Mine location cover the same ground, and are coterminous with the Providence Mine on its northerly boundary line designated as the line running S. 43 deg. W., and marked by the letters f–g on Diagram C.

The line running south 43 deg. west is the only boundary com-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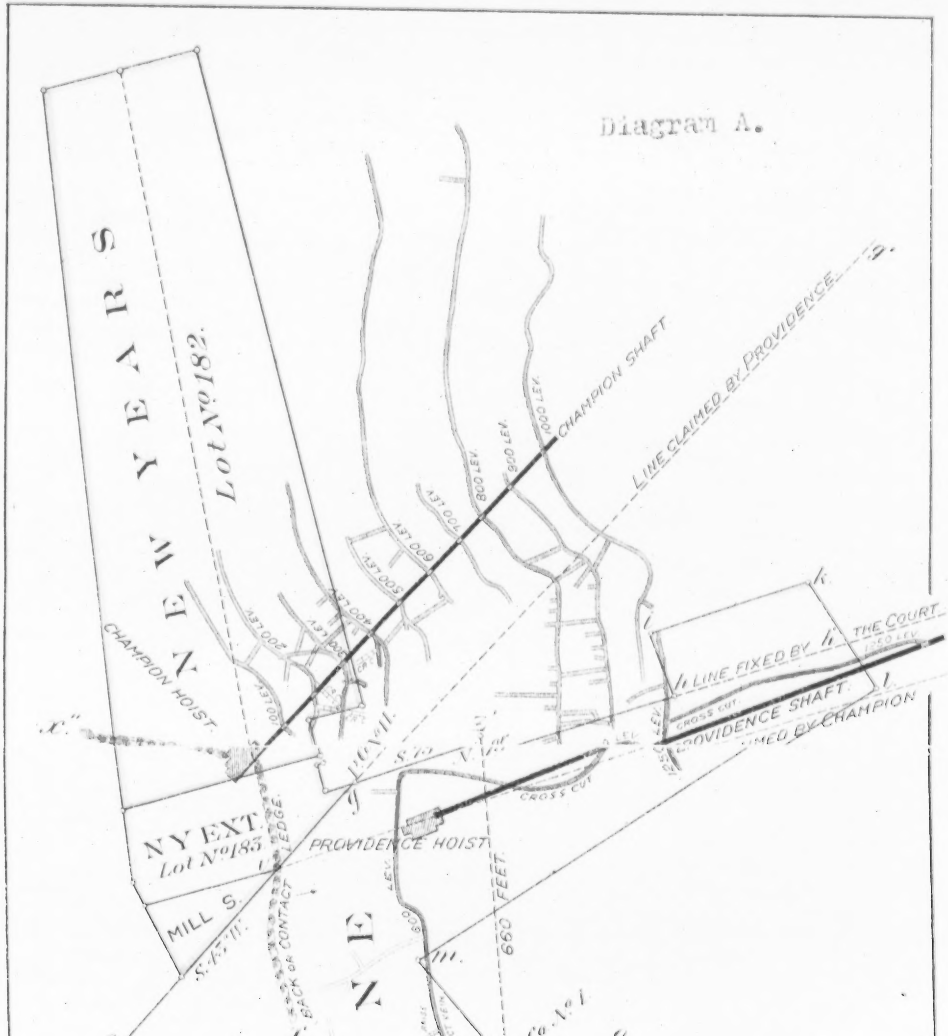
Diagram A.
N E W Y E A R S
Lot No 182.
CHAMPION SHAFT
LINE CLAIMED BY PROVIDENCE
CHAMPION HOIST
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LINE FIXED BY h
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mon to both properties, which is crossed by the "Contact Ledge."

All the mining operations of the Champion Company towards the south on the Contact Ledge were made to conform to its New Year's Extension relocation and the Annex Mine location.

An incline shaft was sunk by the defendant, the Champion Mining Company, upon its mining property, parallel to the line of the Providence surface running S. 43 degrees W., and was so laid out by its superintendent under its direction in order that such shaft should never cross or conflict with said line running south 43 degrees W. (see Transcript, pages 154–155).

Not a level run to the south from this shaft ever crossed said line running south 43 degrees west, or said line prolonged, until about three months before petitioner brought his suit, when the Champion 1,000-foot level was driven along said Contact Ledge and across said line and into the ground in dispute, and then its 900 and 800 levels were sent over the line. (See Diagram A.)

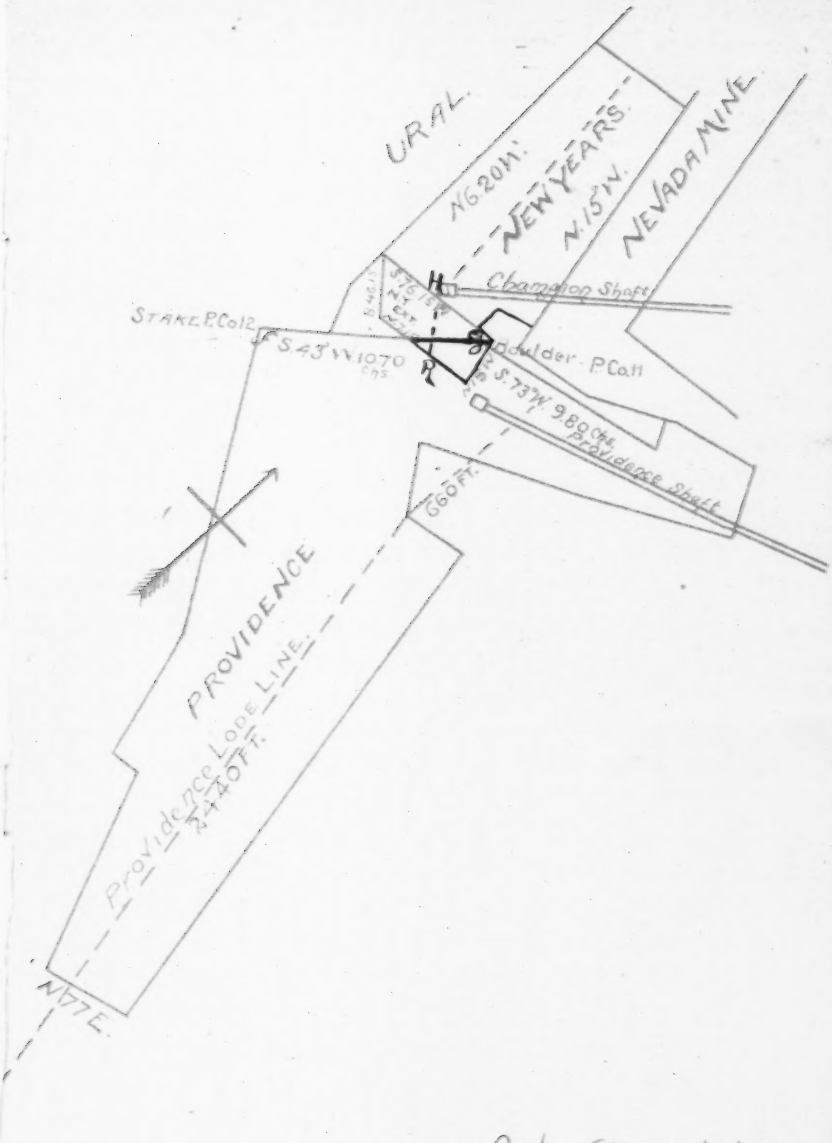
II.

The action was originally commenced by the petitioner, Austin Walrath, in the Superior Court of Nevada County, to recover from the Champion Mining Company $300,000 damages for the wrongful extraction by it of valuable ores and minerals from petitioner's mining ground, and to obtain a decree of the Court restraining further acts of trespass and waste. Upon the application of the respondent herein, the cause was transferred to the Circuit Court, Ninth Circuit, Northern District of California, where the pleadings were recast and the equity case tried. The removal was had solely on the ground that the case was one arising under the laws of the United States, and upon the ground that the title of the Providence was derived from the United States by virtue of a patent issued to petitioner's predecessors in interest. Austin Walrath was at the time, suit was brought, a citizen of the United States and of the State of California. The respondent was a corporation formed under the laws of the State of California, and had its principal place of business therein.

Upon the trial the petitioner here contended that the line of the Providence surface running S. 43 W., designated on diagram "A" by the letters f–g was the end line of the "Contact Vein."

The respondent insisted that the line marked V–V on diagram "A," drawn parallel to the line g–h of the Providence Patent, and applied at the point of departure of the "Contact Vein" from the Providence ground was the end line.

DIAGRAM B.



Scale - 6 Chains to 1 inch

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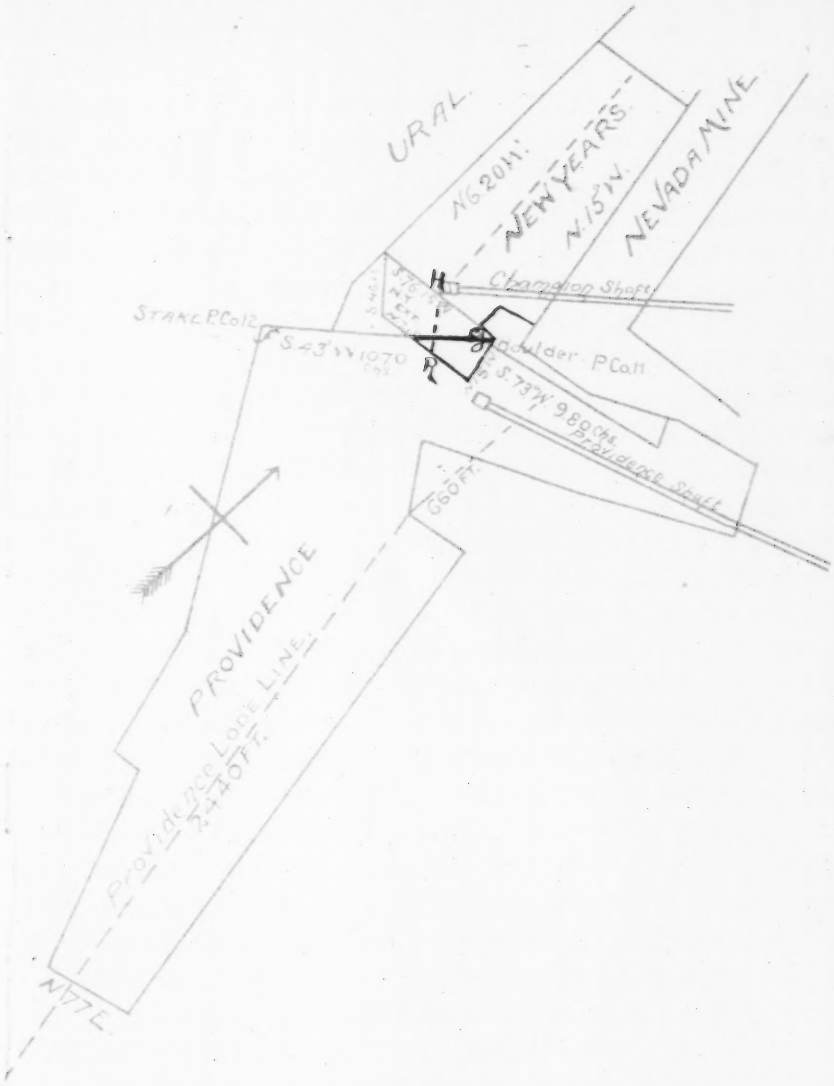

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The contention of the respective parties on that trial will be readily understood by reference to diagram "A," which appears opposite page 2 hereof, and which shows the relative position of all the mining property of the Champion Gold Mining Company, to that of the Providence. The figure bounded in red shows the entire Champion Mining property as it stood after the New Years' extension relocation and the abandonment therein made, while that bounded in green represents the original Providence patent surface ground, with the original patented Providence lode Z–Z extending through it. The red lines represent the ten drifts or levels running north and south from the Champion shaft colored black. The blue lines show the 600-foot and the 1250-foot levels with two cross-cuts running back from the Providence shaft to the "Contact" vein. The "Contact" vein is delineated by the dotted line "X X," and shows the vein as far as exposed in both the Champion and Providence ground.

The Circuit Court, Mr. Justice Hawley presiding, agreed with the contention of neither party. By its decree the Court made the line contended for by petitioner here an end line for the Contact vein for its length only between the points f–g, and established as another end line, the line crossed by the "Granite" lode on its northerly course, described in the Providence Patent as running south 73 degrees, W. 9–80 chains, and designated on the diagram as g-h (See Decree, Trans., pages 77, 80 and 81).

By the terms of the decree the vertical boundary planes determinative of the rights of the Providence on the northerly strike of the "Contact" vein were to be drawn through the line f–g *for its length*, and then through the line g–h and *its* indefinte prolongation easterly, thus:

The evident purpose in fixing the line f–g as an end line, as is indicated by the opinion of the lower Court, was to give some effect to the agreed line recognized by the New Year's Extension relocation of the Champion Company. (See opinion bottom of page 92 and page 93 of Transcript.) And the line g–h

prolonged indefinitely eastwardly was made another end line on the assumption that it was the end line of the "Granite" lode, and on the theory that the end line of the original lode located must be the end line for every ledge found within its surface, or acquired under the Act of May 10th, 1872 (See opinion pages 82 and 90 of Transcript).

III.

On the 29th day of June, 1895, Austin Walrath, complainant in the case—petitioner here—filed his application for an order allowing an appeal, and fixing the penal sum of the bond on appeal. With his petition for an appeal the petitioner filed his assignments of error in which he assigned as error:

1st. The refusal of the Circuit Court to fix the line f-g as the only end line for the north end of the "Contact Ledge."

2nd. The action of the Circuit Court in making the line g-h an end line of the Contact vein.

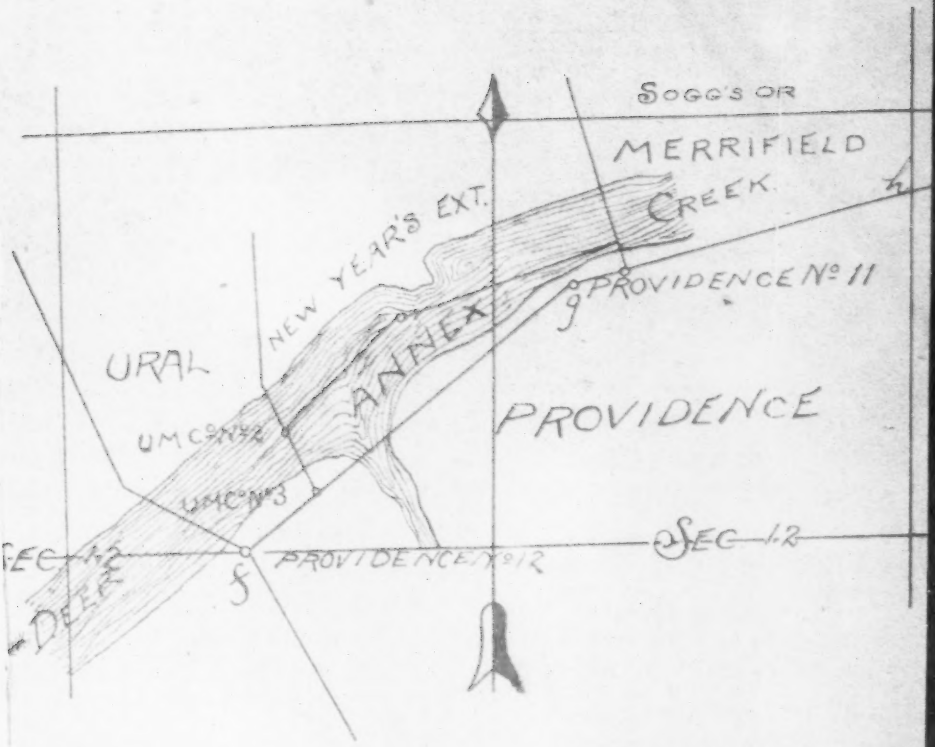
3d. The action of the Circuit Court in giving, by its decree, to the Champion Mining Co. all portions of the Contact ledge north of the line g-h, and thereby those portions thereof lying vertically beneath the parallelogram of the Providence surface designated by the letters h-i-k-h (Diagram A). And petitioner now reassigns the same errors to this Court. (See Trans., page 266 to 270.)

On the said 29th day of June, 1895, an appeal was allowed to the Circuit Court of Appeals for the Ninth Circuit, upon filing a bond in the sum of $500 which bond, in due form, was filed on the same day. A citation was issued to the respondent in proper time, and a transcript of the record filed as required by law and the rules of the Court (See Trans., pages 264 and 273).

On the day of October, 1895, the appeal so allowed and taken as hereinbefore recited, came on for hearing before the United States Circuit Court of Appeals for the Ninth Circuit, and, upon argument of counsel and the Briefs on file, was submitted for decision.

On the 3rd day of February, 1896, the Circuit Court of Appeals declared that "in so far as the decree appealed from "limits, the extra lateral right of the complainant to follow the "vein, called in the record the "Back" or "Contact" vein, in its "downward course by the line f–g, running south 43 degrees "west, extended vertically downward, it is erroneous." The Appellate Court then fixed the lines g–h and a–p as the end lines of the Providence Claim, and "the true end lines of each "and every vein, lode or ledge found within the surface location

DIAGRAM C.


SOGG'S OR
MERRIFIELD
CREEK
NEW YEAR'S EXT.
PROVIDENCE Nº 11
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UMC Nº 3
SEC 12
PROVIDENCE Nº 12
SEC 12
DEEP

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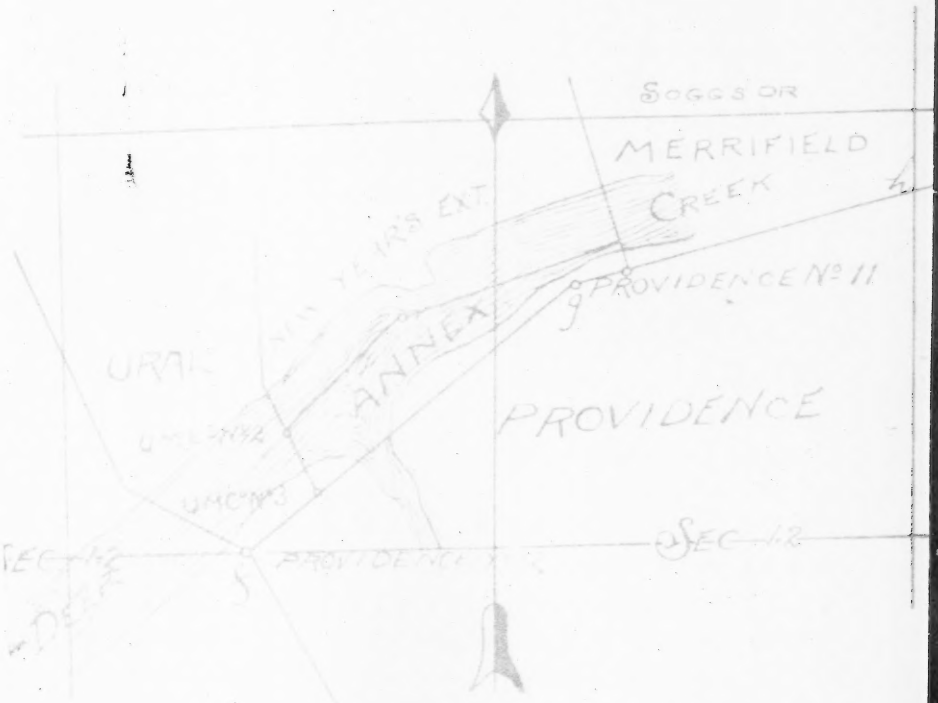
SOGGS OR
MERRIFIELD
CREEK
PROVIDENCE No 11
PROVIDENCE
SEC 12

" of the Providence Claim," and as modified, the judgment and decree of the Circuit Court was affirmed. (See certified copy of opinion Circuit Court of Appeals, Trans. of Record.)

The lines g–h and a–p are marked on Diagram "A," to which reference is hereby made.

The Champion Company was given, as a result of the decision of the Court of Appeals, all portions of the ledge north of the line g–h, and its indefinite prolongation easterly and westerly. The letters g–h–h' h" on Diagram "A" designate the line fixed by the Appellate Court as the end line. Although petitioner was prior in right by a period of five years, the effect of the ruling of the Circuit Court of Appeals was to give to the junior locator, the Champion Mining Company, the right to enter within petitioner's surface lines, cut down vertically, and take out such parts of the Contact vein as lie vertically beneath the little parallelogram of petitioner's surface designated by the letters h–i–k h'.

IV.

And now the issuance of the mandate out of said Circuit Court of Appeals directed to the Circuit Court of the Ninth Circuit, Northern District of California, having been duly stayed until the 17th day of April, 1896, in order that the petitioner might have an opportunity to apply to this Honorable Court for a writ of certiorari to said Circuit Court of Appeals, said petitioner now presents to this Honorable Court, as required by its rules, a duly certified copy of the entire record in said case, and prays for a writ of certiorari to said Circuit Court of Appeals to review said case, upon the following questions presented by the record, to wit:

A.

The Providence, or Granite Ledge, in accordance with the miners' customs and rules, was located prior to March, 1862, for 3100 feet of its length by what was known as a linear location as contradistinguished from a surface or square location. Surface ground was subsequently acquired and on the 28th day of April, 1871, the title to the surface and to said 3100 feet of the Providence Lode was confirmed to the petitioner's predecessor in interest.

Subsequently, under the Act of May 10th, 1872, petitioner's predecessors, by virtue of their ownership of said surface acquired title to the "Contact" or "Back" ledge.

Is the end line of the Providence or Granite Lode to be de-

termined by the number of linear feet located and confirmed by the patent, or is it to be determined by some line of the Providence surface boundaries?

3.

Must the end lines of the Contact ledge acquired under the Act of May, 1872, by virtue of the surface ownership, be determined and governed by the end lines established for the Providence Ledge by the original location? *Or must the end lines of the "Contact Ledge" be determined independently of the Providence Ledge and solely by the relation of the "Contact Ledge" to the surface boundaries?*

4.

Are end and side lines of ledges, whether acquired by location or under the Act of 1872 by virtue of the surface ownership to depend upon what they are called on the miners' convention, or are they fixed and determined by the fact—or the relation which the actual course of the vein bears to the surface lines?

5.

Can any boundary of the surface be accepted lines of a ledge when it does not intersect the ledge, or cross, though never so near approach it.

6.

When proprietors of a ledge are conterminous thereon can there be any end line between them other than that line of the surface which is a boundary common to both?

7.

Can an end line be adjudged which gives to the Champion Mining Company the Junior location, the right to enter and remove any portion of the "Contact Ledge" which lies beneath the surface lines cut down vertically, of the patentee who, admittedly, is prior in right on that ledge?

8.

The Champion Mining Company, having, by its New Year's Extension re-location, under which it claims title, recognized the

line (bearing S. 33 W.) as the true end line, and abandoned all claims to the Carmel Ledge and surface ground south of it in favor of petitioner, can any other line be established as an end line.

Petitioner prays the granting of said writ upon the following grounds, to wit:

1.

The questions involved are of peculiar gravity and general importance, inasmuch as every miner in the Union who has acquired a ledge by virtue of his surface ownership under the Act of May 10th, 1872, will be affected by the principle laid down and enunciated for the first time by the Circuit Court of Appeals in this case, viz.: *that the end lines of ledges acquired under the Act of May 10th, 1872, are to be determined without regard to the course of the ledge by the end lines of the original location.* If the decision of the Circuit Court of Appeals is to stand, miners who have relied on the many decisions of this Court, that end lines are not to be determined by what the miner calls them in his location, but by the fact, will find rights, which, for a quarter of a century they deemed secure, swept aside and the product of their toil, their industry and their self-sacrifice pass to others who had neither act nor part in its creation.

2.

In the interest of uniformity of decision the writ ought to issue, because this Court—many of the Circuit Courts and the Supreme Court of the State of California have laid down the principle, that where there are surface interoppings within the boundaries of both claims the one first located necessarily carries the right to work the vein, *and the junior locator cannot extend his workings under a location of earlier date.*

Argentine Min. Co. vs. Taylor, 122 U. S., 184–185.
Chrisman vs. Shores, 37 Fed., 36–37.
Tyler vs. Savage, 34 Fed., 294–295.
Blue Bird vs. Maroney, 23 P., 1022.
Ball vs. Shilling, 27 P., 708.
Wilhelm vs. Sylvester, 101 Cal., 358–360.

In the face of the fact that petitioner acquired his right to the ledge May 10th, 1872, the Circuit Court of Appeals, by its decision, has given to the respondent, who located on the ledge in

1877, all portions of the ledge north of the line g–h and its prolongation, and therefore those portions of it lying beneath the parallelogram of petitioner's surface, designated by the letters h–i–k–h'.

3.

The jurisdiction in the case of *Austin Walcath* vs. *Champion Mining Co.* was not dependent entirely, or at all, upon the opposite parties to the suit or controversy, being aliens and citizens of the United States, or citizens of different States. The case, moreover, did not arise under the patent laws, or under the revenue laws, or under the criminal laws, nor was it a case in admiralty. The judgment and decision of the Circuit Court of Appeals is therefore not final within the meaning of the Act of March 3rd, 1891, and under Section 6 thereof petitioner is entitled to a writ of *certiorari* as a matter of right.

4.

The decision of the Circuit Court of Appeals gives no effect whatever to the solemn act and deed of the respondent in its New Year's Extension relocation, by which it abandonded in favor of the Providence all of the lode and surface to the south of the line f–g. In fact, the Appellate Court ignores that question altogether, although the Circuit Court specifically found that some effect must be given to it.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* be issued out of and under the seal of this Court directed to the Circuit Court of Appeals of the United States, for the Ninth Circuit, commanding the said Circuit Court of Appeals to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and all of the proceedings of the said Circuit Court of Appeals in the case of *Austin Walcath, Appellant*, vs. *Champion Mining Company, Appellee*, No. 243, as identified by the transcript of the record, to the end that the said case may be reviewed and determined by this Court as provided by Section 6 of the Act of Congress, entitled "An Act to establish Circuit Courts of Appeals " and to define and regulate in certain cases the jurisdiction of " the Courts of the United States, and for other purposes," Approved March 3rd, 1891. And that your petitioner may have such other and further relief and remedy in the premises as to this Court may seem meet and appropriate and in conformity with the said Act. And that said decree of the Circuit Court of

Appeals in the said case, and every part thereof, may be reviewed, and your petitioner will ever pray, etc.

AUSTIN WALRATH,
Petitioner.
SMITH & MURASKY,
Solicitors and Counsel for Petitioner.

P. REDDY,
Of Counsel.

UNITED STATES OF AMERICA,
Northern District of California, } ss.

James F. Smith, being first duly sworn, says that he is one of the solicitors and counsel for the petitioners above-named, and, as such, has had personal charge for said petitioner of the case in the foregoing petition mentioned, in the Circuit Court of the United States for the Northern District of California, and in the Circuit Court of Appeals of the United States for the Ninth Circuit; that he has read the said petition, and that the facts therein stated are true to the best of his information and belief.

Subscribed and sworn to before me this 27th day of March, A. D. 1896.

JAMES F. SMITH.

CERTIFICATE OF COUNSEL.

We hereby certify that we have carefully examined the foregoing petition and application for a writ of *certiorari*, and that in our opinion the same is well founded, and the case is one in which the prayer of the petition should be granted by this Court.

SMITH & MURASKY,
Counsel and Solicitors for Petitioner.

P. REDDY,
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NOTICE.

To Messrs. Lindley & Eickhoff, counsel for Champion Mining Company:

Take notice that on the 13th day of April, 1896, on the opening of Court, or as soon thereafter as the matter can be heard,

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" of the Providence Claim," and as modified, the judgment and decree of the Circuit Court was affirmed. (See certified copy of opinion Circuit Court of Appeals, Trans. of Record.)

The lines g–h and a–p are marked on Diagram "A," to which reference is hereby made.

The Champion Company was given, as a result of the decision of the Court of Appeals, all portions of the ledge north of the line g–h, and its indefinite prolongation easterly and westerly. The letters g–h–h′ h″ on Diagram "A" designate the line fixed by the Appellate Court as the end line. Although petitioner was prior in right by a period of five years, the effect of the ruling of the Circuit Court of Appeals was to give to the junior locator, the Champion Mining Company, the right to enter within petitioner's surface lines, cut down vertically, and take out such parts of the Contact vein as lie vertically beneath the little parallelogram of petitioner's surface designated by the letters h–i–k h.′

IV.

And now the issuance of the mandate out of said Circuit Court of Appeals, directed to the Circuit Court of the Ninth Circuit, Northern District of California, having been duly stayed until the 17th day of April, 1896, in order that the petitioner might have an opportunity to apply to this Honorable Court for a writ of certiorari to said Circuit Court of Appeals, said petitioner now presents to this Honorable Court, as required by its rules, a duly certified copy of the entire record in said case, and prays for a writ of certiorari to said Circuit Court of Appeals to review said case, upon the following questions presented by the record, to wit:

A.

The Providence, or Granite Ledge, in accordance with the miners' customs and rules, was located prior to March, 1862, for 3100 feet of its length by what was known as a linear location as contradistinguished from a surface or square location. Surface ground was subsequently acquired and on the 28th day of April, 1871, the title to the surface and to said 3100 feet of the Providence Lode was confirmed to the petitioner's predecessor in interest.

Subsequently, under the Act of May 10th, 1872, petitioner's predecessors, by virtue of their ownership of said surface acquired title to the "Contact" or "Back" ledge.

Is the end line of the Providence or Granite Lode to be de-

termined by the number of linear feet located and confirmed by the patent, or is it to be determined by some line of the Providence surface boundaries?

B.

Must the end lines of the Contact ledge, acquired under the Act of May, 1872, by virtue of the surface ownership, be determined and governed by the end lines established for the Providence Ledge by the original location? *Or must the end lines of the "Contact Ledge" be determined independently of the Providence Ledge and solely by the relation of the "Contact Ledge" to the surface boundaries?*

C.

Are end and side lines of ledges, whether acquired by location or under the Act of 1872, by virtue of the surface ownership to depend upon what they are called in the miners' location, or are they fixed and determined by the *fact*—by the relation which the actual course of the vein bears to the surface lines?

D.

Can any boundary of the surface be an end line of a ledge when it does not intersect the ledge, or cross, touch or even approach it.

E.

When proprietors of a ledge are coterminous thereon, can there be any end line between them other than that line of the surface which is a boundary common to both?

F.

Can an end line be adjudged which gives to the Champion Mining Company the Junior location, the right to enter and remove any portion of the "Contact Ledge" which lies beneath the surface lines cut down vertically, of the petitioner who, admittedly, is prior in right on that ledge?

G.

The Champion Mining Company, having, by its New Year's Extension re-location, under which it claims title, recognized the

line f-g-running S. 43 W. as the true end line, and abandoned all claims to the Contact Ledge and surface ground south of it in favor of petitioner, can any other line be established as an end line".

Petitioner prays the granting of said writ upon the following grounds, to wit:

1.

The questions involved are of peculiar gravity and general importance, inasmuch as every miner in the Union who has acquired a ledge by virtue of his surface ownership under the Act of May 10th, 1872, will be affected by the principle laid down and enunciated for the first time by the Circuit Court of Appeals in this case, viz.: *that the end lines of ledges acquired under the Act of May 10th, 1872, are to be determined without regard to the course of the lode by the end lines of the original location.* If the decision of the Circuit Court of Appeals is to stand, miners who have relied on the many decisions of this Court, that end lines are not to be determined by what the miner calls them in his location, but by the *fact*, will find rights which, for a quarter of a century they deemed secure, swept aside, and the product of their toil, their industry and their self-sacrifice pass to others who had neither act nor part in its creation.

2.

In the interest of uniformity of decision the writ ought to issue, because this Court—many of the Circuit Courts and the Supreme Court of the State of California have laid down the principle, that where there are surface outcroppings within the boundaries of both claims, the one first located necessarily carries the right to work the vein, *and the junior locator cannot extend his workings under a location of earlier date.*

Argentine Mg. Co. vs. *Tarbet*, 122 U. S., 484–485.
Cheesman vs. *Shreve*, 37 Fed., 36–37.
Tyler vs. *Sweeny*, 54 Fed., 294–295.
Blue Bird vs. *Murray*, 23 P., 1022.
Bell vs. *Shilicom*, 27 P., 768.
Wilhelm vs. *Sylvester*, 101 Cal., 358–360.

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JAMES F. SMITH.

CERTIFICATE OF COUNSEL.

We hereby certify that we have carefully examined the foregoing petition and application for a writ of *certiorari*, and that in our opinion the same is well founded, and the case is one in which the prayer of the petition should be granted by this Court.

SMITH & MURASKY,
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